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IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Louisa Pickens et al.,

Appellants,

vs.

J. H. Merriam et al.,

Appellees.

Brief of Appellees J. H. Merriam, Eugene Wellke, Alma J.
Schmidt and Minnie S. Farnsworth.

J. H. MERRIAM,

JAY D. RINEHART,

ROBERT B. MURPHEY,

HUNSAKER, BRITT & COSGROVE,

Title Ins. Bldg., 5th & Spring Sts., Los Angeles,
Solicitors for Appellees J. H. Merriam, Eugene Wellke,
Alma J. Schmidt and Minnie S. Farnsworth.

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When this case was in this court before *upon the bill of complaint* (Pickens v. Merriam, 242 Fed. 363), this court, *assuming* all the facts alleged in the bill of complaint to be true, followed the decision of the supreme court of Kansas in an almost identical case upon a like appeal upon the pleadings (Pickens v. Campbell, 98 Kan. 518), held that the facts alleged, if true, did entitle appellants herein to *some* relief, and therefore that the bill of complaint was improperly dismissed on motion. But when, upon a *trial on the merits*, it came to proving the facts alleged, the trial court in the state of Kansas [see memorandum of decision, Tr. pp. 706-

715], and the supreme court of Kansas (Pickens v. Campbell, 104 Kan. 426, 179 Pac. 343; also found at pp. 720-731 of the transcript), and the U. S. District Court for the Southern District of California [see opinion of Judge Bledsoe, Tr. pp. 194-200], all decided and held that there was no fraud shown or anything in the record entitling appellants to any relief. These appellees invite this court's special attention to these three opinions and decisions. It would certainly seem that if any such wholesale and indiscriminate fraud existed as appellants contend for, that some one of the numerous judges who have carefully examined the record and the evidence upon which appellants rely to prove their charges, would have so held. It is also significant that none of the other six brothers and sisters of Ferdinand Fensky, nor the father of the intervenor Charles Fensky, during his lifetime are complaining or ever saw sufficient merit in the charges of fraud to join the complainants either in this action or in the similar action filed in the courts of Kansas against Campbell and the sureties on his bond.

This brief is filed only on behalf of appellees J. H. Merriam, Eugene Wellke, Alma J. Schmidt and Minnie S. Farnsworth. Appellees Amanda Katzung, Corrine Loveland and Don Ferguson have no connection or relationship to these appellees and are not represented by counsel.

Appellants are residents of Kansas and Nebraska respectively and appellees residents of California. The

amount involved as alleged in the bill of complaint exceeds \$3,000.00.

STATEMENT OF FACTS.

The "statement of the case" contained in the brief of appellants is so radically at variance with the facts shown by the evidence, and is also so meagre, that it becomes necessary for these appellees to briefly summarize the facts in their entirety.

Ferdinand Fensky, a resident of California, died intestate and without issue August 7, 1903, leaving real and personal property in the state of California and also in the state of Kansas, as follows:

Real estate in Kansas, covered by contracts to sell [Tr. pp. 507, 322-6]	\$22,965.75
Real estate in Kansas, not covered by contracts to sell, as near as can be ascertained [Tr. pp. 299, 322-326, 465-502].	15,000.00
Real estate in California, appraised at [Tr. pp. 526-8]	6,200.00
Personal property in Kansas and California [Tr. pp. 294-302, 529]	21,506.00
Total	<u>\$65,671.75</u>

Appellants' statement that the aggregate amount was \$80,000.00 is not correct.

He left as his heirs at law his widow, Jeanette Fensky, and as collateral heirs seven brothers and sisters (two of whom are appellants herein and one of whom is the deceased father of the intervenor),

and a nephew who was the sole surviving issue of a deceased brother.

There is no dispute but that the descent of real property situated in Kansas is governed solely by the laws of Kansas, and that the descent of the personal property in Kansas and the real and personal property in California is governed by the laws of descent of the state of California, the domicile of Ferdinand Fensky at the time of his death. Under the laws of Kansas (Sec. 2953 Gen'l Stats. Kansas, sections 8 and 20 of An Act Concerning Descents and Distributions) the widow is entitled to all of the real property owned by her husband at the time of his death and to one-half of the personal property within the state. Under the laws of descent of California the widow is entitled to one-half of the separate property of the husband, real and personal (Sec. 1386 Cal. Civ. Code); and as to community property she is entitled to three-fourths, whether real or personal. (Sec. 1402 Cal. Civil Code.) It is to be observed that the law of descent of the state of Kansas as to personalty is the same as the law of descent of the state of California as to the separate property of the husband, both real and personal.

Ferdinand Fensky and Jeanette Fensky were married in Kansas, more than thirty years prior to his death, and resided there until January, 1902, when he moved to California. [Tr. p. 621.] At the time of his marriage, he was apparently in very meager circumstances. He was then engaged in the ice business in Topeka, Kansas, commencing on a very small

scale, delivering his ice in a wheelbarrow personally, and Mrs. Fensky was running a boarding house. [Tr. p. 621.] For several years, at a later time Mr. Fensky had a hotel, Mrs. Fensky doing the cooking for the hotel part of the time. [Tr. p. 622.] During the later years of his residence in Topeka he was a contractor and builder [Tr. p. 275], and bought land and subdivided it, as Fensky's Addition to Topeka, and built a number of houses on the lots and sold them on conditional sale contracts with forfeiture clause. He removed his residence to San Pedro, California, in 1902. All of the real property in California, as elsewhere, which he possessed at the time of his death, was acquired after marriage. Mr. Fensky had intended making a will covering all his estate to his widow but failed to do so. [Tr. pp. 329, 593.]

At the request of the widow [Tr. p. 328], M. T. Campbell, who had been Mr. Fensky's attorney and agent for years, and who was familiar with all the details of his affairs in Kansas [Tr. pp. 302, 329], was appointed administrator in Kansas on September 9, 1903. [Tr. p. 292.] Due to the fact that a note and mortgage (the so-called Stoker mortgage) was in Campbell's hands and needed to be satisfied of record at once, the property having been sold [Tr. pp. 294, 331], Mr. Campbell did not wait for the written appointment of the widow [Tr. p. 337] but was appointed on the petition of one J. W. McClure. [Tr. pp. 291-2.] In October, 1903 [Tr. p. 575], Jeanette Fensky, the

widow, was appointed as administratrix of her husband's estate in California.

On October 26, 1903, Campbell filed an inventory in the probate court of Shawnee county, Kansas, showing \$4297.14 money collected from the Stoker mortgage referred to above, and Kansas notes and mortgages sent to him from California after the death of the deceased for convenience of administration, appraised at \$16,640.50. He listed the real property owned by Ferdinand Fensky, including the real property in the Fensky Addition which Ferdinand Fensky had contracted to sell. [Tr. pp. 293-302.]

Jeanette Fensky, as administratrix in California, filed an inventory [Tr. pp. 524 *et seq.*] setting forth the real property in California appraised at \$6200, and the personal property consisting of one promissory note for \$400, and the household furniture appraised at \$100. The appraisal was made by three qualified and disinterested persons duly appointed by the probate court [Tr. pp. 524, 631] who before appraising the property took an oath of office to truly, honestly and impartially appraise the property of said estate. [Tr. p. 525.] All of these appraisers died before the trial. It is claimed, but without one iota of evidence in support of the claim, that the widow procured these three appraisers to underappraise the real property of the estate in California.

The parcel of land at San Pedro, California, and appraised at the sum of \$3000 [Tr. p. 528], upon which Mr. and Mrs. Fensky lived at the time of his

death, was set apart to the widow by a judgment of the superior court of Los Angeles county under date of November 4, 1903, as a probate homestead, under the provisions of sections 1464 to 1468 of the Code of Civil Procedure of California. [Tr. pp. 632-3.] This judgment is assailed on account of the alleged false representation of the widow that the property was worth less than the \$5000 limit for homesteads under the California law, and that the property was community property.

The Kansas notes and mortgages listed by Campbell in his inventory were in California at the time of the death of Ferdinand Fensky, but, after some correspondence, were not inventoried in California but were sent to Campbell as administrator, for the purpose only of convenience in collecting these notes and mortgages, which were all on Kansas property and made by persons living in Kansas, and particularly so that Campbell could satisfy these mortgages of record promptly as administrator. [Tr. pp. 334, 338, 342, 345, 346, 348, 352, 357.] The laws of descent of the state of Kansas and of California relating to these notes are the same. (Sec. 1386 Cal. Civ. Code; Sec. 2953 *et seq.* Gen'l Stats. of Kansas, 1909.)

In view of the fact that Ferdinand Fensky left a large number of notes executed by persons living in Kansas, some of which were secured by Kansas real estate, and also left a number of parcels of real estate in California, which would have to be collected or sold

at considerable expense and delay, if distribution was to be made to the heirs, one-half to the widow, and one-sixteenth to each of the eight collateral heirs, Mr. Campbell and Mr. Goodrich came to the conclusion that it would "simplify matters and shorten up the proceedings for Mrs. Fensky to buy out the interests of the other heirs," and so advised her and the other heirs. [Tr. pp. 329, 339.] The widow, however, did not make up her mind apparently to do so until October 6, 1903 [Tr. fol. 354], when she suggested that Campbell negotiate with the brothers and sisters of Mr. Fensky in Topeka with a view of buying out their interests in return for some of her Kansas real property. [Tr. p. 354.] All the negotiations looking toward the purchase of the interests of the collateral heirs were conducted by Mr. Campbell [Tr. p. 457], with the result that each of them, including appellants, sold out his or her interest to Mrs. Fensky for the sum of \$1000.00 each, with the exception of Fred Fensky, the last one to sell out, who was paid \$1100.00. [Tr. pp. 580-585.] Each of them assigned all of their interests in the estate of Ferdinand Fensky to Mrs. Fensky. [Tr. pp. 580-585.]

Thereafter, on June 5, 1905, the probate court in Kansas [Tr. p. 306] distributed all of the estate of Ferdinand Fensky administered on in Kansas to Jeanette Fensky, his widow. [Tr. p. 306.] She receipted for it in her *individual* capacity [Tr. p. 308] and not as "administratrix," as appellants misleadingly state, at

page 104 of their brief, and on June 6, 1905, Campbell was discharged as administrator in Kansas. [Tr. p. 307.]

On April 11, 1905, the balance on hand in California, remaining after distribution "and all other properties belonging to said estate, whether described herein or not," was distributed by decree of the superior court of Los Angeles county, California, a court of record of general jurisdiction, as follows: "To Hulda Richter, sister of deceased, 1/16 part thereof, and all the remainder to Jeanette Fensky, said widow of deceased." [Tr. p. 642.]

The total appraised value of the personal property in Kansas and the real and personal property in California, was \$27,727.64. [Tr. pp. 294, 302, 526-529, 634-5.] Upon the settlement of the final accounts, the following charges and expenses of administration were allowed:

Expense of administration in Kansas, not including the administrator's fees.....\$ 437.44

Expense of administration in California, including amount of family allowance and the probate homestead set apart to the widow... 4,719.62

The administrator's fees of Mr. Campbell were paid for by the widow by cancelling a note of Campbell to the estate for the sum of \$1,500.00 [Tr. pp. 439-440], which was inventoried. [Tr. pp. 434, 294.] This did not include any compensation to Campbell as the agent of Mrs. Fensky in looking after her individual real

property in Kansas. [Tr. p. 440.] To summarize the total expenses of administration, as shown by the above items, in Kansas and California, was \$6,657.06, which, when deducted from the total gross appraised value of the property in Kansas and California, left a net balance of \$21,149.08.

It is claimed by appellants that the assignment executed by them to the widow were obtained by the fraudulent representations of Campbell acting as agent for Mrs. Fensky, the widow, and that such fraudulent representations constituted extrinsic fraud in that because of such releases they did not appear in the probate courts of Kansas and California, and that therefore the decrees of distribution by the probate courts of Kansas and California in the matter of the estate of Ferdinand Fensky, should be disregarded.

The chief one of the alleged false representations claimed to have been made by Campbell arises out of his inventorying as real estate the various parcels of land in Topeka, Kansas, which Ferdinand Fensky had conditionally contracted to sell prior to his death, and his failing to inventory said contracts *as personal property*, and his alleged concealment of the existence of such contracts, the balance due upon which at the time of the death of Ferdinand Fensky amounted to \$22,965.75 [Tr. p. 507]. These identical contracts were held by the supreme court of the state of Kansas, in *Pickens v. Campbell* (104 Kan. 425, 179 Pac. 343; see the pleadings and record in that case set out in the transcript at pp. 670-731), based on a rule of prop-

erty in Kansas established by a long line of decisions running as far back as 1870, not to work an equitable conversion or to give the vendee any title, legal or equitable, in the property. Mr. Campbell, who was a practicing lawyer in Kansas for many years [Tr. p. 275], after first securing the opinion of the California attorney for the estate, and for the sole purpose of determining at the threshold of his administration how the real property covered by these contracts should be treated and inventoried,—both attorneys acting independently and before the widow decided to negotiate for the purchase of the interests of the collateral heirs [Tr. p. 354],—decided that the property covered by such contracts continued to be real property, the legal and equitable title belonging to Mr. Fensky at the time of his death unaffected by the contracts, and descended, under the laws of Kansas, directly to his widow. Campbell did not inventory the contracts as personalty. His failure so to do and his alleged fraud in concealing the existence of these contracts, constitutes the gravamen of appellants' case.

There are several other comparatively very small items which it is claimed were concealed by Campbell and the widow and not inventoried either in California or Kansas, aggregating in all about \$5,200.00, as follows:

1. The Stein and Simms notes, treated as having been given by Ferdinand Fensky to his wife prior to his death [Tr. pp. 265,456] . . . \$2,700.00

2. The indebtedness of Kimmerlee to Mrs. Fensky [Tr. pp. 377, 378, 422, 424].....	300.00
3. Balance in First Trust & Savings Bank, Pasadena, in joint account of "Mrs. Jeanette Fensky or Mr. F. Fensky" [Tr. p. 252].....	500.00
4. Certificate of deposit payable to "F. or Jeanette Fensky" or "to the order of either on the return of this certificate properly indorsed" [Tr. p. 258].....	800.00
5. Balance in Citizens State Bank of Topeka, Kansas, on October 5, two months after the death of Ferdinand Fensky, amounting to \$942.82, of which \$913.57 was receipted for to the bank by M. T. Campbell as agent for Mrs. Jeanette Fensky, and regarded by the bank, Campbell and Mrs. Fensky as her individual property collected from Kansas realty [Tr. pp. 309, 310, 343, 355, 454].....	913.57
Total	<u>\$5,213.57</u>

NOTE: Even if it appeared, which it does not, that the foregoing items had belonged to the estate of Ferdinand Fensky and were improperly omitted from the inventory thereof, it would not have appreciably increased the 1/16 interest of each of appellants.

In 1903 and again in 1904 there was a tremendous flood, caused by the overflow of the Kansas River flowing through Topeka, which caused great damage and seriously affected property values, and the ability of the holders of the notes and mortgages inventoried to pay the same. [Tr. pp. 274, 277, 367, 420.] Camp-

bell represented to appellants that a number of the persons owing the estate on the notes and mortgages inventoried in Kansas wanted more time in which to pay, and that if Mrs. Fensky, the widow, should purchase their interests, so that collection would not have to be forced for the purposes of distribution amongst the heirs, she could accommodate these people and still eventually collect nearly all the money on the notes, but that if collection were forced there would necessarily be much expense and loss attending the collection. [Tr. pp. 393-4.] Only a few of them had been paid in July, 1904, when appellants made their assignments [Tr. 461-2], and many were unpaid nearly a year later at the time of distribution [Tr. p. 445]. Appellants claim (without support by the record) that Campbell fraudulently represented to appellants that many of these notes were not collectible and that considerable loss would thereby result to the estate. We think this includes a statement of all of the various charges of fraud made in connection with the estate of Ferdinand Fensky.

Appellant, Louisa Pickens, testified that she first acquired knowledge of the alleged fraudulent acts complained of in 1912. [Tr. p. 280.] Appellant Johanna Schutt and intervenor Charles Fensky did not testify, and from all that appears in the record may have acquired knowledge thereof ten years before this suit was filed.

Appellant Louisa Pickens has lived in the city of Topeka since 1875, and resided there at the time her

brother, Ferdinand Fensky, made the subdivision of Fensky's Addition, in which the property covered by most of the contracts to sell was located. [Tr., pp. 266, 279.] She visited back and forth with her brother Ferdinand Fensky, who resided in Fensky's Addition. [Tr. pp. 274-5-6.] Ferdinand Fensky, up to the time of his leaving Kansas in 1902, superintended the building of houses on this addition, making the plans and building the houses himself. [Tr. p. 275.] A comparison of the list of the realty contracts to sell [Tr. pp. 506-7] with the list of insurance policies [Tr. p. 361] shows that the real property covered by these contracts was improved with the houses constructed by Mr. Fensky.

Mrs. Krause, upon the advice of whose husband both appellants Schutt [Tr. p. 273] and appellant Pickens [Tr. p. 279] depended, frankly admits that in 1903-1904 she knew of the Fensky addition and that her brother Ferdinand Fensky was building houses and selling them, that no one else was doing so in the Fensky Addition, that the purchasers were living in the houses, and that she knew the names of a few of them. [Tr. p. 277.]

Mrs. Pickens was but little acquainted with M. T. Campbell in his lifetime. She depended on Mr. Krause and what she knew about the estate she learned from Mr. Krause. [Tr. p. 279.] Campbell mentioned the contracts to Mr. Krause, advising him that the "transactions in the Fensky addition were all real estate" and frankly expressed his conviction that the collateral

heirs had nothing to do with them. [Tr. p. 269.] It also appears that the sale of property in this addition was advertised by Ferdinand Fensky in the newspapers and that there was a big "For Sale" sign on the addition. [Tr. p. 274.] The addition was on the main highway and the street car line from Topeka to Oakland, Kansas, runs near the Fensky addition. [Tr. p. 278.] Mrs. Schutt was in Topeka during the time that the addition was being laid out, and when it was being built up, and corresponded with Mrs. Krause about the time that Mrs. Krause assigned her interest to Mrs. Fensky. [Tr. p. 278.] It also appears that Fred Fensky, a brother of the deceased, came over to Topeka from Leavenworth and made an investigation. [Tr. p. 275.] He stayed there at the home of Mr. and Mrs. Krause for two days and told Mrs. Krause that he "went to Fensky's addition and looked over the property." [Tr. p. 277.] On July 25, 1904, said Fred Fensky called upon Mr. Campbell and quizzed him about the land and "trenched very closely upon the idea that those contracts were personal property and subject to the same law covering the distribution of the rest of the personal property." [Tr. p. 399.] He then wanted to know why the notes and mortgages taken from the purchasers under these contracts were not "personal property of the estate." [Tr. p. 399.] Campbell frankly explained to him his opinion that the property covered by these contracts belonged to the widow individually and not to the estate." This was

just four days before Appellant Louisa Pickens and her sister Mrs. Krause assigned their interest in the estate to Mrs. Fensky and nine days before Mrs. Schutt assigned her interest. [Tr. pp. 399,583-4.]

It appears that Fred Fensky employed an attorney by the name of Jackson to represent him [Tr. p. 412] and that he later, apparently satisfied that these contracts were not personalty but realty, and that the widow's offer was fair, accepted the same. [Tr. p. 584.] It also appears that Mrs. Wendt, a sister residing in Germany, made an inquiry through the American Consul [Tr. pp. 269, 276, 406], who employed an attorney by the name of Slater to investigate matters for her [Tr. p. 423], who came to the conclusion that the widow's "offer was a square thing." [Tr. p. 424.]

Between November, 1903, and August, 1904, deeds were recorded in said Shawnee county from Fensky and his wife to fifteen of the holders of the realty contracts listed on pages 506-7 of the transcript, most of said deeds being dated in April, 1903 [prior to Mr. Fensky's death, and signed and acknowledged by him], and in most cases there was recorded at the same time, mortgages on the property, all dated and acknowledged subsequent to the death of Ferdinand Fensky, which apparently represented a part of the purchase price. [Tr. pp. 325-6.] And between August, 1904, and June, 1906, deeds to nearly all of the other purchasers in said list were recorded in said Shawnee County, most of them being also dated in April, 1903 (prior to Mr.

Fensky's death, and signed and acknowledged by him) [Tr. pp. 322-4], and mortgages representing a part of the purchase price were recorded on or about the same date, in most instances. [Tr. pp. 324-5.]

On the 18th day of September, 1907, Jeanette Fensky executed and acknowledged deeds for the conveyance of all of the real estate owned by her in California to appellees in this action, other than J. H. Merriam and Don Ferguson. [Tr. pp. 623-5, 565, 566, 573.] All of this California property with the exception of that covered by the deed to Mrs. Katzung was acquired by her after Mr. Fensky's death. What identical funds were used in buying these properties does not appear from the record. On the same day she executed a will, devising and bequeathing "to the living nieces and nephews of my deceased husband, Ferdinand Fensky, all my real estate, land contracts, mortgages and mortgage notes on land in Shawnee County, Kansas." [Tr. pp. 732, 648.] This will did not purport to cover any of her California property. Said deeds were all drawn in the office of said Don Ferguson, a real estate agent in Pasadena, who had been acting for several years in making purchases and sales of real property, collecting rent, etc., for Mrs. Fensky. [Tr. pp. 565-6.] The deeds were executed by Mrs. Fensky for the avowed purpose of wanting "to dispose of her property" "by deeding it to the people she wanted it to go to." [Tr. p. 573.] These deeds were delivered to Mr. Ferguson in the presence of the grantees with instructions to hold them and to record them

upon her death. [Tr. pp. 566, 573, 623.] The deeds were in his custody until her death, when they were recorded. [Tr. pp. 566, 573.] They were never back in her hands. [Tr. p. 566.] Ferguson testified that she told him that if he got a chance to sell any of this property at a profit to do it and that she would "make it right" with the grantee in said deeds delivered as aforesaid. [Tr. pp. 565-6.] She later deeded to a stranger one of the parcels covered by one of those deeds.

Appellee Farnsworth, a niece of Mrs. Fensky, who lived with her up until the time Mrs. Fensky died [Tr. p. 622], who was present at the time the deeds were signed, denied that Mrs. Fensky instructed Mr. Ferguson to sell any of the property covered by said deeds. [Tr. p. 623.]

Jeanette Fensky died on July 9th, 1908, in Los Angeles, leaving as her sole surviving next of kin two sisters, Mrs. Schmidt and Mrs. Katzung, and a brother, Mr. Wellke, who are appellees herein. [Tr. pp. 664, 625.] These surviving next of kin soon after the death of Mrs. Fensky, sought the advice of J. H. Merriam with reference to administration upon her estate, and being unable to agree upon any one else to act as administrator with the will annexed for that portion of the estate in California, they urged J. H. Merriam to act in that capacity and he finally consented to do so. Said Wellke, Katzung and Schmidt filed their petition for probate of will August 1st, 1908, alleging that they were the next of kin and heirs at law of said Jeanette

Fensky [Tr. p. 645], and said will was admitted to probate in California on August 14th, 1908, and letters of administration with the will annexed issued to said J. H. Merriam.

The estate in California was appraised at about \$3,500.00 [Tr. p. 653], consisted largely in claims against the said Don Ferguson, Amanda Katzung and others, and a great deal of controversy developed over said claims. And said administrator made a great effort to secure an amicable settlement regarding the same, and finally succeeded in doing so on a compromise basis without litigation. [Tr. pp. 614-616, 654.]

These negotiations occupied about a year's time, and no inventory was filed until the said compromise arrangement satisfactory to all concerned was consummated, and then upon the filing of the inventory, on September 8th, 1909, a final account and petition for distribution was also filed, and a decree of distribution made and entered on September 22d, 1909. [Tr. pp. 663-4.] This decree contained the customary omnibus clause, distributing "all other property whether described herein or not." [Tr. p. 664.] Actual distribution was made in accordance with the decree, and upon filing vouchers showing such distribution, an order of discharge of said J. H. Merriam, as administrator with the will annexed of the estate of said Jeanette Fensky, deceased, was made and entered on October 13th, 1909. [Tr. pp. 664-5.]

After the said will of Jeanette Fensky was probated in Los Angeles County, an authenticated copy of the

same was admitted to probate in the Probate Court of Shawnee County, Kansas, and on the 9th day of October, 1908, was recorded therein, and said Campbell was appointed administrator with the will annexed and proceeded to administer upon that portion of said estate described in said provision in said will. [Tr. p. 313. His final account and petition for distribution was heard and settled in said court on the 13th day of May, 1913, and distribution made of the amount in his hands for distribution to the twenty-two legatees described in said clause in said will, of whom five were the children of the plaintiff Louisa Pickens and two were the children of the plaintiff Johanna Schutt. [Tr. pp. 315-8.]

In spite of the omnibus clause in the decree of distribution of the estate of Jeanette Fensky distributing *all* the property of her estate, *whether described in the decree or not*, to the deceased's next of kin, appellees Wellke, Schmidt and Katzung, who were determined by the court in that decree to be "her only heirs at law" [Tr. pp. 663-664], it is claimed by appellants that the deeds to appellees signed and delivered by Jeanette Fensky to appellees were not properly delivered, and that the properties covered thereby are *unadministered assets* of her estate, to which they *as collateral heirs of Jeanette Fensky*, are entitled. They also claim that the Campbell and the new Stein notes for \$1,000 and \$600 respectively, the first of which Mrs. Fensky gave and *delivered* to her nieces, appellees Farnsworth and Love-

land, jointly [Tr. pp. 454, 608, 610], and the second of which to her sisters, appellees Katzung and Schmidt [Tr. pp. 607-608], were fraudulently omitted from the inventory of her estate. It is also claimed that Judge Merriam, the administrator, fraudulently omitted these items from his inventory. Although the evidence is slightly conflicting as to whether Judge Merriam knew of the circumstances surrounding, he denied such knowledge [Tr. p. 606] and is supported by the weight of the evidence, which is too voluminous to detail here. He, and Campbell, who was named as executor of Mrs. Fensky's will, after consulting together, concluded that the notes mentioned were valid gifts to the persons above named, and Campbell accordingly paid his note to the said donees thereof. None of the other next of kin, *who were the only persons ever appearing in the estate*, objected, but consented thereto. [Tr. p. 613.] It is admitted by the pleadings that during the pendency of the proceedings for the probate of the estate of Jeanette Fensky appellants "*paid attention to said proceedings* and from time to time secured copies of papers that were filed therein." [Tr. pp. 27, 53.] Appellants never appeared in said estate proceedings, or claimed to be heirs, or asked to have their alleged heirship determined therein, or did anything to make known to the court or appellees herein, their present claims to be the sole heirs of Jeanette Fensky until this suit was filed.

On May 15th, 1914, appellants herein filed in the District Court of Shawnee County, Kansas, their peti-

tion against said M. T. Campbell and Thomas Page and E. C. Arnold, the two latter being the sureties on the bond given by said M. T. Campbell, as, administrator of the estate of said Ferdinand Fensky, and in said petition substantially the same facts are alleged as the ground of the cause of action therein, and in addition the execution of the bond of the administrator of said estate of Ferdinand Fensky in the state of Kansas, copy of said bond being attached to said petition. [Tr. pp. 670-680.]

Subsequently the separate answer of said M. T. Campbell was filed on December 10, 1914. [Tr. pp. 684-690.]

Said M. T. Campbell died on March 1st, 1915. His son, Donald A. Campbell, was appointed as administrator with the will annexed of his estate, and said action was thereafter revived in the name of said Donald A. Campbell, administrator. [Tr. pp. 690-691.] Thereafter appeals were taken to the Supreme Court of Kansas from the judgment overruling said demurrers, and said judgment was affirmed. (*Pickens v. Campbell*, 98 Kan. 518.) Answers were afterwards filed by said defendants [Tr. p. 692], and upon a trial of the merits at which practically all of the documentary evidence introduced in the case at Bar appeared in evidence, judgment was rendered against complainants and in favor of the administrator of M. T. Campbell's estate, the lower court rendering an opinion reviewing the Kansas decisions and the evidence. [See Tr. pp. 706 to 719.] An appeal was

thereafter taken to the supreme court of Kansas, which affirmed the judgment of the district court of Shawnee County, Kansas. (Pickens v. Campbell, 179 Pac. Rep. 343. Copy of that decision also appears at pages 720 to 731.)

In considering this case the court should always bear in mind the two separate and distinct theories of appellants, one for relief on the ground of alleged fraud of M. T. Campbell and Jeanette Fensky in connection with the assignments by appellants to Jeanette Fensky of all their interests in the estate of Ferdinand Fensky, and the others as alleged heirs of Jeanette Fensky.

Position of Appellees Merriam, Wellke, Schmidt and Farnsworth.

The general propositions contended for by the above named appellees may be briefly summarized as follows:

(1) The assignments executed by appellants to the widow, Jeanette Fensky, of all their interests in the estate of her deceased husband, Ferdinand Fensky, and the decrees of distribution of Ferdinand Fensky's estate based in part upon said assignments were not obtained by fraud, and are binding upon appellants in this suit.

(2) The interest of Ferdinand Fensky in the Kansas realty covered by the contracts to sell was real property descending under the laws of Kansas to his widow. The effect of said contracts covering property

in Kansas is to be determined solely by the laws of Kansas. Under a line of decisions of the Supreme Court of Kansas commencing as far back as 1870 and constituting "rule of property" in that state said contracts had no effect upon the legal or equitable title of Ferdinand Fensky which remained in him up to the time of his death. These decisions are binding upon this court.

(3) No property belonging to the estate of Ferdinand Fensky was fraudulently or otherwise concealed from appellants, nor were appellants in any way imposed upon.

(4) The judgment against appellants in the case of *Pickens v. Campbell*, 104 Kansas, 424, 179 Pac. 343, is binding upon appellants and conclusively adjudicated that the sales' contracts (covering only a part of the Kansas realty), constituted realty, and that no fraud was committed upon appellants by M. T. Campbell as the agent of Jeanette Fensky, the predecessor in interest of appellees herein.

(5) Even if appellees had proved sufficient facts to set aside the releases and assignments to Jeanette Fensky and the decree of distribution to her in the estate of Ferdinand Fensky, it would be of no avail to them for not one of the appellants have traced, or can definitely or at all trace, the balance due of his or her alleged interest in the estate of Ferdinand Fensky into the hands of any of appellees.

(6) Conceding, for the purpose of argument only, that any property belonging to the estate of Ferdinand Fensky had been accidentally omitted from the inventories in the administration of his estate, such fact would be of no avail to appellants in view, *first*, of the binding effect of the assignments of *all* the interests in said estate to the widow Jeanette Fensky, and *second*, in view of the usual omnibus clause in the decree of distribution of said estate distributing not only the property therein described, but *all other property belonging to said estate wherever situated*, whether described in the decree or not.

(7) Appellants are barred from any claim based upon the alleged fraud of Campbell and Jeanette Fensky, if any they ever had, by the statute of limitations. (Sub. 4, Sec. 338, C. C. P.)

(8) Appellants are barred from any claim based upon the alleged fraud of Campbell and Jeanette Fensky, if any they ever had, by their own laches.

(9) Appellants are barred from any relief as heirs of Jeanette Fensky by the decree of distribution of her estate. (No intrinsic fraud in connection with the administration of this estate is alleged or claimed.)

(10) Appellants have not and never had any rights as heirs of Jeanette Fensky.

(11) All of the deeds given by Jeanette Fensky to her next of kin were delivered during her lifetime. Neither the property covered by said deeds nor any

of the personal property alleged to belong to said estate actually belonged to said estate, nor did the administrator of said estate fraudulently fail to inventory any of the same.

(12) The alleged relief prayed for by appellants as heirs at law of Jeanette Fensky is barred both by the statute of limitations and by their own laches.

Lastly, that there is no equity in appellants' case.

ARGUMENT.

I.

The Assignments Executed by Appellants to the Widow, Jeanette Fensky, of All Their Interests in the Estate of Her Deceased Husband, Ferdinand Fensky, and the Decree of Distribution of Ferdinand Fensky's Estate Based in Part Upon Said Assignments Were Not Obtained by Fraud, and Are Binding Upon Appellants in This Suit.

The chief element of fraud relied upon by appellants to set aside the assignments executed by them of their interests in the estate of Ferdinand Fensky to Jeanette Fensky, his widow, and the decrees of distribution of his estate to Jeanette Fensky, which were in part based on said assignments, is that Campbell, the Kansas administrator, fraudulently concealed from appellants the existence of the conditional sale contracts of lots in Fensky's Addition in Kansas, and fraudulently omitted said contracts from the personal

property inventory of the estate of Ferdinand Fensky in Kansas, but instead, fraudulently listed the real property covered by said contracts in his inventory *as real estate* belonging to said estate. The balance due upon these contracts aggregated \$22,965.75 at the time of the death of the deceased and constituted the great bulk of the property alleged to have belonged to the *Estate of Ferdinand Fensky* and to have been fraudulently concealed from appellants. The other items of property belonging to the widow but alleged to have belonged to the Estate of Ferdinand Fensky and to have been fraudulently concealed amounted to but about \$5000.00, in the aggregate, and would not have appreciably increased the undivided one-sixteenth interest of each of appellants, as collateral heirs.

It is obvious therefore that the main point of the case is the effect if any of the contracts for the sale of lots in Fensky's Addition, Topeka, Kansas, upon the title of Ferdinand Fensky to said lots. Until appellants have demonstrated that *under the laws of Kansas* these contracts worked an equitable conversion of the title of Ferdinand Fensky in these lots (many of which had houses on them) into personalty—thereby changing their devolution under the laws of succession—appellants “have not launched their case.” If under the laws of Kansas no equitable conversion was worked—and such we submit has been the well established law in Kansas since 1870, amounting to a rule of property—then Ferdinand Fensky remained

the owner of the lots in question at the time of his death, and they descended under the laws of Kansas subject to said contracts, direct to the widow. Sections 2953, 2942, Gen. Stats. Kansas, 1909 (Secs. 20 and 8 of an act concerning Descents and Distribution).

If on the other hand, the contracts had worked an equitable conversion, then Ferdinand Fensky was not the owner of the lots covered by the contracts, but was the owner of the money due thereunder, which, being personalty, descended, under the laws of California, the domicile of Fensky at the time of his death, one-half to his widow and one-half to his brothers and sisters (Subd. 2, Sec. 1386, Civil Code of California).

Appellant's case fails at the outset under either one of the following three views:

First: If, as a matter of law, these Kansas contracts had no effect upon the title of Ferdinand Fensky to the lots covered thereby, or, in other words, did not work an equitable conversion thereof, then appellants' case fails, even if it had been proven that Mr. Campbell had a fraudulent intent in so determining and in acting upon such determination: for since appellants never had any interest therein, any alleged fraudulent intent in regard thereto would be entirely immaterial.

Second: If, on the other hand, an equitable conversion had been worked, since the assignments by appellants to the widow, were negotiated by Mr. Camp-

bell honestly and in good faith firmly believing that Ferdinand Fensky continued to own the legal and equitable title to the Kansas real property covered by these contracts, and that the same, *as realty*, descended direct to the widow, he committed no *fraud* in his alleged concealment of the existence of these contracts; and hence appellants cannot succeed in setting aside the assignments to the widow of their interests in the estate of Ferdinand Fensky, or the decrees of distribution based thereon, on the ground of *fraud*, or on any other ground.

Third: Appellants knew of the existence of said contracts, or had notice of facts which, if pursued with ordinary diligence, would have disclosed their existence; hence there was no concealment of their existence.

The Interest of Ferdinand Fensky in the Kansas Realty Covered by the Contracts to Sell, Was Real Property Descending to His Widow. No Equitable Conversion Was Worked by Said Contracts, Under the Laws of Kansas.

(a) THE FEDERAL DECISIONS ARE A UNIT IN HOLDING THAT THE VALIDITY, CONSTRUCTION AND EFFECT OF EXECUTORY CONTRACTS TO SELL LAND ARE GOVERNED BY THE LAWS OF THE STATE WHERE THE LAND IS SITUATED:

Clarke v. Clarke, 178 U. S. 186;

Olmsted v. Olmsted, 216 U. S. 386;

Central E. M. Co. v. Central Eureka Co., 204
U. S. 266, 272;

De Vaughn v. Hutchinson, 165 U. S. 566;

Brine v. Insurance Co., 96 U. S. 627, 636;

Kenyon v. Mulert, 184 Fed. 825, 107 C. C. A.
63;

Laughlin v. N. Wisconsin Lumber Co., 176
Fed. 772; affirmed, 193 Fed. 367, 113 C. C. A.
291.

In *Olmsted v. Olmsted*, 216 U. S. 386, 393, the court quoted the following extract from *De Vaughn v. Hutchinson*, *supra*:

“It is a principle firmly established that to the law of the state in which the land is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances.”

The contracts involved in this case are, in each instance, in the following form:

“Witnesseth, that said party of the first part (F. Fensky), for the consideration hereinafter mentioned, covenants and agrees *to sell* and convey unto said party of the second part (the purchaser), his heirs and assigns, all the following described real estate situated in the county of Shawnee and state of Kansas, to-wit: (Description of property.)

“In consideration of which, said party of the second part covenants and agrees to pay unto the said party of the first part, for the same, the sum of (amount), as follows: (Terms of payment.) And said party of the first part, on receiving said sum and sums of

money, *at the time and in the manner aforementioned*, shall at his own expense execute and deliver to said party of the second part a good and sufficient warranty deed. * * *

“It is further agreed between the parties to these presents that said party of the second part shall pay all taxes or assessments becoming chargeable to or upon said premises after this date; *and if default be made in fulfilling this agreement, or any part thereof, by or on behalf of said party of the second part, this agreement shall, at the option of said party of the first part, be forfeited and determined, and said party of the second part shall forfeit all payments made by him on the same, and such payments shall be retained by said party of the first part in full satisfaction, and in liquidation of all damages by him sustained, and he shall have the right to re-enter and take possession of said premises.* * * *” [Tr. p. 507; italics ours.]

(b) THERE IS NO DOUBT, FROM THE MERE READING OF THE FOREGOING CONTRACT, THAT TIME WAS CONTEMPLATED TO BE OF THE ESSENCE OF THE CONTRACT, AND THAT THE VENDOR RESERVED THE RIGHT OF ABSOLUTE FORFEITURE AND THE RIGHT TO RE-ENTER AND TAKE POSSESSION OF THE PREMISES IN THE EVENT OF ANY DEFAULT ON THE PART OF THE PURCHASER.

Pickens v. Campbell, 179 Pac. 343 at 344;

Drollinger v. Carson, 97 Kas. 502, 505; 155 Pac. 923;

Douglas Co. v. U. P. R. W., 5 Kas. 615.

These very contracts were construed by the Supreme Court of Kansas and the Kansas decisions reviewed

in *Pickens v. Campbell*, 179 Pac. 343 at 344, from which we quote the following pertinent extract:

"It will be observed that the form of contract used was not one of present sale; it was one to sell. No obligation on the part of the vendor to convey arose except on receiving the stipulated sums of money, at the time and in the manner specified. In case of default, the right to forfeit and to re-enter was expressly reserved. The forfeiture clause is identical with that appearing in the contract considered in the case of Drollinger v. Carson, 97 Kan. 502, 505, 155 Pac. 923. It was there said that such provisions are sometimes held to make time of the essence of the contract, citing 39 Cyc. 1369, 1370. It was not necessary to declare that such was the effect in that case, because, after default of the vendee, the vendor made time essential by demanding payment within a stated period, under penalty of forfeiture. That is just what the contract under consideration did at the beginning of the relations between the vendor and the vendee. Title was withheld; performance by the vendee at the time stipulated was a condition precedent to the acquisition of title; default entailed forfeiture of payments already made and right of possession; the vendor was then at liberty to re-enter or to invoke the remedy of ejectment; and insertion of the formula, 'Time is of the essence of this contract,' would have been superfluous." (Italics ours.)

In the case of *Douglas Co. v. U. P. R. W.*, 5 Kas. 615 (cited in *Pickens v. Campbell*), the contract did not contain a statement that time of performance by

the vendee was an essential element, but the court said:

“It is true that the company had made a conditional purchase of this land, but they were not to receive the patent therefor until all the conditions of the purchase were fulfilled; and if any one of the conditions were violated * * * they were to forfeit all their right, title and interest in and to said land, and it was then to be sold to other parties. It will be perceived from the very nature of this contract, and from the character of the parties to the same, that *time* was an essential ingredient of the contract. The contract was purely executory, and it was not intended that the government should be bound to execute its part of the contract, by parting with any portion of its land, unless the railroad company should fulfill every portion of its part of the contract first—and strictly within the time stipulated. It was not intended to have any law suits over the matter.” (P. 521.)

The Supreme Court of Kansas in discussing the contracts here involved said:

“In this case most of the lots were sold for small payments to be made during considerable periods of time, and it is quite clear that Ferdinand Fensky intended to forestall lawsuits by requiring purchasers to accept contracts which provided for strict performance, under penalty of forfeiture. The result is, the contract is identical in all its legal aspects with the contract considered in Brown v. Thomas, Sheriff, 37 Kan. 282,

15 Pac. 211, *and the vendor continued to be the owner of the land.*"

(Pickens v. Campbell, 179 Pac. 343, 344-5; see stipulation and the typical contract set out at pages 507-8 of the transcript providing for \$12.00 down and \$12.00 per month until \$968.55 should be paid, which would require nearly seven years.)

(c) UNDER THE LAWS OF KANSAS, IT HAS BEEN A WELL-SETTLED RULE OF PROPERTY SINCE 1870 THAT CONTRACTS TO SELL LAND, SUCH AS ARE HERE INVOLVED, WHEREIN TIME IS OF THE ESSENCE AND THE VENDOR RESERVES THE RIGHT OF FORFEITURE AND TO RETAKE POSSESSION IN CASE OF ANY DEFAULT BY THE VENDEE, DOES NOT OPERATE AS AN EQUITABLE CONVERSION SO AS TO VEST IN THE VENDEE THE LEGAL OR EQUITABLE TITLE TO THE LAND, BUT THE ENTIRE TITLE, LEGAL AND EQUITABLE, REMAINS IN THE VENDOR UNTIL THE VENDEE HAS COMPLETELY PERFORMED.

Pickens v. Campbell (Kan.), 179 Pac. 343 (decided Mar. 8, 1919; rehearing denied Apr. 17, 1919);

Douglas Co. v. U. P. Ry. Co. (decided in 1870), 5 Kan. 615;

Brown v. Thomas, 37 Kan. 282 (appealed from Shawnee County, and decided in 1887) 15 Pac. 211;

Williams v. Osage Co. (decided in 1911), 84 Kan. 508, 114 Pac. 858.

Appellants herein were also the appellants in *Pickens v. Campbell*, *supra*, and there litigated, without success, the very question which they are again litigating in this case. It was there held, based upon a long line of Kansas decisions amounting to a "rule of property" in that state, that these precise contracts "*were not personal property*," and, accordingly, that "*they had no place in the personal property inventory*"; that the land covered by the contracts descended as realty entirely to the widow; that *the motives of M. T. Campbell in omitting them from the inventory were good* (p. 344) and that he acted honestly, in good faith, and was guilty of no fraud whatsoever upon appellants.

This decision was arrived at after the same case had previously been before the Supreme Court of Kansas (98 Kan. 518, 159 Pac. 21), where the court fully recognized that "ordinarily, the right to the purchase of land contracted to be sold but not conveyed at the time of the vendor's death, passes to his personal representative and not to his heirs." In this earlier opinion, it was accordingly held that the bill of complaint stated a cause of action; but as the Kansas court points out, in the later opinion, "the precise nature of the contracts was not disclosed by the petition, and from certain ambiguous statements, it was inferred that *notes* were given for the purchase price." At the trial such proved not to be the case, in each instance the only writing consisting of the contracts themselves now before this court.

We have therefore a determination based on a long line of Kansas decisions, by the court of last resort in Kansas of the status of this precise Kansas real estate as affected by these very contracts, for the purposes of devolution under the laws of succession in that state, and this determination was arrived at in an action instituted by these very appellants against the personal representative in Kansas of Ferdinand Fensky, deceased.

In the case of Douglas County v. Union Pacific Railway Company, 5 Kansas 615 (cited in Pickens v. Campbell), the contract for the sale did not *expressly* make time of the essence of the contract. The court recognized the equitable doctrine that when land is sold on credit and a deed is to be made when the purchase money is paid, the land at the time sale is made becomes the vendee's and the purchase money the vendor's. But it is said in the opinion:

*"This maxim never applies where time is of the essence of the contract and where the land is subject to absolute forfeiture on failure of some conditions of the sale being performed. * * * In such a case no title, legal or equitable, passes until every condition of the sale is performed."*

In Brown v. Thomas, the contract (as stated in Pickens v. Campbell, 179 Pac. 343 at page 345), was "identical in all its legal aspects" with the contract in the case at bar. The form of the contract is set out in full in the opinion. The effect of this contract is thus stated by the court:

“Horton, C. J. *The agreement for the sale of the real estate described in the petition confers neither the legal nor the equitable title upon Davison. It is simply an agreement to sell real estate upon conditions precedent, and sets forth a conditional sale only. In the contract, it is stipulated, in substance, that time is the essence thereof; that the failure to perform any of its conditions shall render the contract null and void; and that, by such failure, the party holding under the contract shall forfeit to the other party all the money paid thereon, and all improvements made on the premises, and all right to compensation therefor, and that he shall cease to have any interest therein.*”

“The maxim that equity considers that when land is sold on credit, and the deed is to be made when the purchase money is paid, that the land at the time of the purchases became the vendee’s, and the purchase money the vendor’s; that the vendor becomes the trustee of the vendee with respect to the land, and the vendee the trustee of the vendor with respect to the purchase money,—is not applicable here.”

“The legal title has not passed to him, because no deed or other conveyance has yet been made; and the equitable title has not passed, because the land has not been paid for, and because, on account of the provisions for forfeiture, it is clearly the intention of the parties, as indicated in the contract, that such title shall not pass until the land is paid for.” (15 Pac. 213.)

In *Williams v. Board of Commissioners*, 84 Kan. 508, 114 Pac. 858, (distinguished on its facts in *Pickens*

v. Campbell) the contract provided that: "If the purchaser failed to make the deferred payments within a *reasonable time after the same became due and payable*, then the contract should 'cease and terminate and be forever void.'" The court pointed out that "this is not making time of the essence of the contract." (114 Pac. 861). This is manifestly correct for the agreement allowed the vendee a "*reasonable time*" after the due date within which to avoid a forfeiture. The court, in discussing the doctrine of equitable conversion, quoted with approval from Douglas County v. U. P. Rwy. Co., 5 Kan. 615, as follows:

"For this maxim never applies where time is of the essence of the contract, and where the land is subject to absolute forfeiture on failure of some condition of the sale being performed; for there is no necessity in such a case for courts of equity to resort to any such fiction, and equity never looks upon a thing as done which ought not to be done, nor in favor of any party, except one that has a right to pray that it may be done. In such a case no title, legal or equitable, passes until every condition of the sale is performed; and, if such condition is not performed at the exact time that it should be performed, no title ever passes."

The court then said:

"The distinction here made illustrates the difference between this case and Brown v. Thomas, *supra*. In the latter case time was made of the essence of the contract, and *all rights of the purchaser were immediately forfeited upon the failure*

to pay at the exact time. On the same theory in the Douglas county case it was held that the purchaser at the time of the execution of the contract acquired no title, legal or equitable. In the case at bar, however, the contracts may be properly designated as contracts of sale and not contracts to sell."

Although the decision of the supreme court of Kansas in *Pickens v. Campbell*, 179 Pac. 343, was rendered after the rights of the parties to the contracts here involved occurred, manifestly it did not establish any new doctrine. *The cases, which are cited by the supreme court of Kansas, dating back to 1870, have never been overruled in that state, but, on the contrary, establish a well-settled rule of property in contemplation of which it is to be presumed that the contracts here involved were entered into.*

In support of this contention we need only quote the following extract from the decision of the supreme court of Kansas in *Pickens v. Campbell*:

"The plaintiffs say the Brown case should be overruled. The court is entirely satisfied with the decision in the Brown case; but, if it were not, it would hesitate to overturn a rule of property first announced in the Douglas County case in 1870, and recognized as late as 1911 in the Osage County case."

179 Pac. 343, 345.

The court had previously pointed out that the contract in the Brown case "is identical in all its legal aspects" with the Fensky contracts here involved.

Judge Bledsoe, before whom this case was tried in the lower court, investigated the Kansas decisions and correctly came to the same conclusion, as is shown by the following extract from his opinion:

“It is stated (*Pickens v. Campbell*, 179 *Pac.* 343, 345) and upon an independent investigation seems to be true, that through a long period of years, the consistent ruling of the Kansas courts has been to the effect that in a case such as this,—where notes for the purchase price were not given, where time, either expressly or impliedly, was made of the essence of the contract, and where the right was given to the vendor upon a default on the part of the vendee immediately to declare a forfeiture and retake possession of the property agreed to be conveyed,—there is no conveyance of the legal title and no equitable conversion as is sought to be taken advantage of herein. Mr. Campbell then was entirely right in his attitude. Being right, fraud, intentional deceit, conduct approximating criminality, on his part, may not now be successfully charged against him.” [Tr. pp. 196-7.]

All of the Kansas cases cited by appellants are distinguishable from the case at bar. The cases of Gilmore v. Gilmore, 60 Kan. 606, 57 Pac. 505, and Williams v. Osage County, supra, are distinguished and disposed of on their facts in Pickens v. Campbell, 179 Pac. 344, 345. In Jones v. Hollister, 51 Kan. 310, Courtney v. Woodworth, 9 Kan. 443, Usher v. Hollister, 58 Kan. 43, and Burke v. Johnson, 37 Kan. 337, notes were given for the purchase money, there was no forfeiture

clause, and time was not of the essence of the contract. In *Campbell v. Kansas Town Co.*, 69 Kan. 314, *time was not of the essence, and the contract contained no forfeiture clause.* In *Laughlin v. Braley*, 25 Kan. 147, it does not appear that time was of the essence, or that the contract contained a forfeiture clause. All of the Kansas decisions on this subject are also reviewed in the decision of the district court of Shawnee, Kansas, set out in full at pages 703 to 715 of the transcript and the cases cited by appellants are clearly distinguished.

(d) THE RULE OF PROPERTY LAID DOWN IN THE SERIES OF KANSAS CASES, BEGINNING IN 1870 WITH THE DOUGLAS COUNTY CASE AND ENDING WITH THE SECOND CASE OF *PICKENS V. CAMPBELL*, THAT CONTRACTS SUCH AS ARE HERE INVOLVED DO NOT OPERATE TO DIVEST THE OWNER OF HIS LEGAL OR EQUITABLE TITLE, IS BINDING UPON THE FEDERAL COURTS.

The rule is well stated in the following extract from *Bucher v. Cheshire R. R. Co.*, 125 U. S. 555, 583:

“It is also well settled that where a course of decisions, whether founded upon statutes or not, have become *rules of property* as laid down by the highest courts of the state, by *which is meant those rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession thereto, they are to be treated as laws of that state by the federal courts.*”

In *Burgess v. Seligman*, 107 U. S. 20, at p. 33, it is said:

“The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results

would be anomalous and inconvenient but for the exercise of mutual respect and deference. *Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is.*"

In *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, practically all of the previous decisions of the court are reviewed; at the conclusion of which the court stated the rule, as applied to the case at bar, to be as follows:

"We take it, then, that it is no longer to be questioned that the federal courts in determining cases before them are to be guided by the following rules: 1. When administering state laws and determining rights accruing under those laws the jurisdiction of the federal court is an independent one, not subordinate to but co-ordinate and concurrent with the jurisdiction of the state courts. 2. *Where, before the rights of the parties accrued, certain rules relating to real estate have been so established by state decisions as to become rules of property and action in the state, those rules are accepted by the federal court as authoritative declarations of the law of the state.* 3. But where the

law of the state has not been thus settled, it is not only the right but the duty of the federal court to exercise its own judgment, as it also always does when the case before it depends upon the doctrines of commercial law and general jurisprudence.

4. So, when contracts and transactions are entered into and rights have accrued under a particular state of the local decisions, *or when there has been no decision by the state court on the particular question involved*, then the federal courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued. *But even in such cases, for the sake of comity and to avoid confusion, the federal court should always lean to an agreement with the state court if the question is balanced with doubt."*

215 U. S. 360.

The case at bar comes exactly within the second rule above declared.

In *Kuhn v. Fairmont Coal Co.*, *supra*, the contract involved was a deed to real estate, the question involved in the case was not the *effect* of the contract or deed upon the *title* to the property. The *single decision* of the state court relied upon there as being binding upon the federal court was decided *after* the deed was executed, and after the injury complained of was sustained, and after the action in the federal court was instituted, and *the point then decided in the state court had not been previously adjudged by the supreme*

court of that state (p. 356). What the decision would have been in a situation such as is involved in this case is shown by the following pertinent extract from the opinion:

"If, before the rights of the parties in this case were fixed by written contract, it had become a settled rule of law in West Virginia, as manifested by decisions of its highest court, that the grantee or his successors in such a deed as is here involved, was under no legal obligation to guard the surface land of the grantor against injury resulting from the mining and removal of the coal purchased, a wholly different question would have been presented."

215 U. S. 361.

In *Keene Five Cent Sav. Bank v. Reid*, 123 Fed. 221 (writ of *certiorari* denied in 191 U. S. 567), cited by appellants, the rule is correctly stated as follows:

"Now, it is a well-settled doctrine that the proper interpretation of a private contract presents a question of general law, concerning which the federal courts are entitled to express an independent judgment, unless the contract is one relating to the sale or conveyance of real or personal property, and it contains words or phrases that, in virtue of local decisions, have acquired a definite meaning, and have thus become rules of property within the state. When such is the case the federal courts will interpret a contract as the state courts would interpret it. Jackson v. Chew, 12 Wheat, 153, 6 L. Ed. 583; Suydam v. Williamson, 20 How. 427, 15 L. Ed. 978; Burgess v. Seligman, 107 U. S. 20,

2 Sup. Ct. 10, 27 L. Ed. 359; *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 584, 8 Sup. Ct. 974, 31 L. Ed. 795."

123 Fed. 226.

We fail to see how either this case or any of the other cases cited by appellants in their brief are of any consolidation to them, for the contract involved here is one relating to the sale of real property in Kansas, and the question involved here is *the effect of these contracts, if any, upon the legal and equitable title of Ferdinand Fensky to the Kansas land covered thereby*. These contracts do contain clauses which, by "virtue of a series of local state decisions," beginning with the Douglas County case, decided in 1870, which, as stated in the case last cited, "have acquired a definite meaning" and give to the contract a well-settled and definite effect, and "have thus become rules of property" within the state of Kansas. Such being the case, the federal courts will give the contracts the same effect as would be given to them by the supreme court of Kansas. There are no federal decisions cited by complainants, or which can be cited by complainants, to the contrary.

In Story's Equity Jurisprudence (Vol. II, par. 1107) the learned author says:

"It is the exclusive province of the courts of the state of the *situs* of the property to determine its ownership, and its devolution and transfer and *whether or not there has been a conversion of the property from one sort to another*. This is essen-

tially so from the very nature of things, or else the state would have certain classes of property, within its boundaries completely subject to the caprice and desires of non-residents and thus render nugatory its laws enacted for the purpose of protecting its own citizens and their property rights."

and cites *Clarke v. Clarke*, 70 Conn. 483, 40 Atl. 111, affirmed in 178 U. S. 186, 44 L. Ed. 1028 (hereinbefore cited) and *Holcomb v. Wright*, 5 App. Dist. of Col. 76, 86. In the latter case the rule is thus stated:

"The question of sale and conversion of real estate, situate in any of the states of the Union, must depend upon the law of such state, and not upon the law of another jurisdiction."

5 App. Dist. of Col. p. 86.

This court upon the previous appeal of the case at bar, after referring to and following the first decision of *Pickens v. Campbell*, 98 Kan. 518, 159 Pac. 21, which likewise arose solely upon the complaint stated: *"This decision disposes of these questions so far as they relate to the estate in Kansas, and is persuasive as to the rules applicable to the estate in California."* (Italics ours.)

Decisions cited by appellants laying down what the rule is in other states, or what the rule is in the federal courts where there have been no previous decisions in the state, or where a single state decision is relied upon, rendered, perhaps, after the accrual of the rights involved, or where the earlier state decisions under which

the rights accrued have been overruled by a later state decision, or where the question to be decided is one of general jurisprudence,—are not in point; for such is not the situation in the case at bar.

(e) EVEN IF APPELLANTS COULD OVERCOME THE IMPASSABLE BARRIER CREATED BY THE “RULE OF PROPERTY” LAID DOWN BY THE KANSAS DECISIONS, STILL AN EQUITABLE CONVERSION OF REALTY WAS NOT WORKED BY THE CONTRACTS EXECUTED BY FERDINAND FENSKY, EVEN UNDER THE DECISIONS FROM OTHER JURISDICTIONS CITED BY APPELLANTS, BECAUSE HE HAD NOT THE ABSOLUTE OWNERSHIP OF THE LAND, AND THE CONTRACTS WERE NOT THEREFORE SUCH CONTRACTS AS EQUITY WILL SPECIFICALLY ENFORCE.

The Kansas law (section 2942, Gen. Stats. Kansas, 1909) gives the wife a *present* one-half interest in value in all realty to which at any time during marriage the husband acquires a legal or equitable title, which has not been sold on execution or other judicial sale, and of which “the wife” has made no “conveyance,” providing the wife was *at any time* a resident of the state of Kansas.

In McKelvey v. McKelvey, 75 Kan. 325, 89 Pac. 663, 121 Am. St. Rep. 435, this section is construed as follows:

“The interest which the statute gives to the wife in the real estate of her husband during his life is not easily classified or defined. Because of this

difficulty it has been thought by some to be in its nature an inheritance, and such a suggestion may be found in some of the opinions of this court. But practically *the entire trend of the decisions of this court is to treat it as a present existing interest—one which the wife may protect by an appropriate action during the life of the husband and against his wrongful acts:* Busenbark v. Busenbark, 33 Kan. 572, 7 Pac. 245; Flanigan v. Waters, 57 Kan. 18, 45 Pac. 56.

The wife's interest does not depend for its inception upon the death of the husband, as an inheritance would, but springs into existence by operation of law upon a concurrence of seisin and the marriage relation. This interest, equal to one-half in value of all the real estate in which the husband at any time during the marriage had a legal or equitable interest, which has not been sold on execution or other judicial sale, and which the husband had not conveyed at a time when his wife was not, or never had been a resident of this state, and not necessary for the payment of his debts, upon the death of the husband shall, under the direction of the probate court, be set apart by the executor as her property. And the only control exercised by the probate court or the executor or administrator over the wife's interest in the real estate owned by her husband at the time of his death is to ascertain its value and set it apart to the widow—not as an heir of her deceased husband, but as her separate and absolute property in fee simple. And since this interest does not come to her by inheritance, it is not a bar to her recovery that her husband parted with his title in such

a fraudulent manner that neither he nor his heirs can recover it."

121 Am. St. Rep. 437-8.

See also:

Munger v. Baldridge, 41 Kan. 236, 21 Pac. 159,
161-3;

Williams v. Wessels, 94 Kan. 71, 145 Pac. 856,
858.

In each of the various contracts, which it is stipulated were identical in form [Tr. p. 507], the agreement only purports to be made between "F. Fensky" as the "party of the first part" and the various vendees as parties of the second part, and is executed solely by those parties. Each of the contracts contain mutual and dependent stipulations between those parties alone, and on its face, each is a complete agreement between them. Jeanette Fensky was not made a party to and did not sign any of these contracts, but signed a statement at the end thereof after the signatures of the vendor and vendee, as follows:

"I hereby consent to the within agreement. Jeanette Fensky." [Tr. pp. 509-510.]

The relationship of Jeanette Fensky to F. Fensky nowhere appears upon the face of any of the instruments.

It has been repeatedly held that a contract in writing purporting to be between two persons, not unilateral in its covenants but containing mutual and dependent stipulations to be by the named parties severally performed, which is signed by them and also by a third

person in such a manner as not to indicate the capacity in which the latter signs, that the third person is not a party to the agreement, parol evidence will not be admitted to show that he signed the contract intending to be bound either as principal or surety, and no action can be maintained either by or against him upon it.

Blackmer v. Davis, 128 Mass. 538.

It is there pointed out that it is immaterial that the third person is similar in name to one of the signing parties. See also:

Shepard Company v. Freeman, 40 Mont. 144,
105 Pac. 484,

where the third party signed a similar clause to that in the case at bar, reading "We both consent to the above contract." To the same effect see:

Lancaster v. Roberts, 144 Ill. 213, 33 N. E.
27, 29;

Carson v. National Life Ins. Co. (N. C.), 77
S. E. 353, 354-5;

Shriner v. Craft, 166 Ala. 146, 51 So. 884, 139,
Am. St. Rep. 19;

Fuchs v. Block, 156 Ill. App. 482;

Alcazar etc. Co. v. Pereira, 194 Ill. App. 507;

Evans v. Conklin, 24 N. Y. Supp. 1081.

This doctrine is considered with especial favor in cases wherein the widow's rights of dower in the estate of her husband is in question. See:

Bruce v. Wood, 1 Metcalf 542;

Carson v. National Life Ins. Co. (N. C.), 77
S. E. 353, 354-355.

And the rule applies with even a greater degree of force to an action for specific performance upon a contract so signed, for an action cannot be maintained for specific performance where the agreement is uncertain as to parties.

Hissan v. Parrish, 41 W. Va. 686, 24 S. E. 601, 602;

Myers v. Metzger, 63 N. J. Eq. 779, 52 Atl. 274, 275.

It is plain, therefore, that Ferdinand Fensky not having the absolute ownership of the land covered by these contracts, but his wife during his lifetime having an interest in all of said real property equal to one-half the value thereof, no contract made by said Ferdinand Fensky, though it might bind him to the extent of his interest in the land, could be specifically enforced against an unwilling purchaser.

Pomeroy Eq. Juris. (4th ed.), Sec. 2178, 2256;

Ellis v. Treat, 236 Fed. 120; 149 C. C. A. 330;

It cannot be contended that the interest of Mrs. Fensky could be defeated upon the doctrine of estoppel. There could be no estoppel by deed, for as we have demonstrated there was no sufficient deed or contract. There could not be estoppel *in pais*, for the doctrine does not apply as to a matter of fact "equally open to the knowledge of the parties," and it is clear that the purchaser in each of these contracts must have known of the wife's statutory interest in the property. Bige-

low on Estoppel (6th ed.), p. 604. Furthermore, whether or not there could be said to have been an estoppel on the part of Mrs. Fensky to dispute her liability as against the vendees under the various agreements, that defense would be a *personal* one which the *vendees alone* could set up. It could not be set up as *against* the purchaser. Bigelow on Estoppel (6th ed.), p. 710. It therefore follows that the contracts in question could not operate as an equitable conversion of the property. As stated by Pomeroy in his work on Equity Jurisprudence:

“In order to work a conversion, the contract must be valid and binding, free from inequitable imperfections, and such as a court of equity will specifically enforce against *an unwilling purchaser.*”

Pomeroy's Eq. Juris. (14th ed.), Sec. 1161.

To the same effect see:

Wittingham v. Lightite, 46 N. J. Equity 429,
19 Atl. 611;

Lunsford v. Jarrett, 11 Lea 192.

(f) AS STILL ANOTHER BARRIER TO APPELLANTS' THEORY, THE STATUTES OF KANSAS DEFINING THE INTEREST OF THE WIFE IN THE ESTATE OF HER DECEASED HUSBAND CONTAIN THE MANDATORY REQUIREMENT THAT ONE-HALF THE REAL PROPERTY BE SET APART TO HER AS REAL ESTATE, AND PRECLUDE THE DOCTRINE OF EQUITABLE CONVERSION.

The statutes of Kansas do not permit the theory of equitable conversion where the statutory interest of

the wife is involved. The provision defining the wife's interest is as follows:

"One-half in value of all the real estate in which the husband at any time during the marriage, had a legal or equitable interest which has not been sold on execution or other judicial sale, and not necessary for the payment of debts, and of which the wife has made no conveyance shall, under the direction of the probate court, be set apart by the executor as her property in fee simple upon the death of the husband, if she survives."

Comp. Laws of Kansas 1885, Ch. 33, Sec. 8.

(This statute is in addition to Sec. 20 of the same act providing that all the real property descends direct to the widow where there are no children.)

This statute, it will be noted, applies to real estate in which the husband may have had an interest "at any time during the marriage." Now, in the instant case, the wife, it has been demonstrated, was not a party to the agreements in question, and in any event she certainly cannot be said to have made a "*conveyance*" of the property. The property was clearly real estate in which the husband at some time "during the marriage" had an interest, and therefore, in compliance with the clear "mandate" of the statute, one-half of that property must "*be set apart* by the executor as her (Mrs. Fensky's) *property in fee simple*." Even if it be assumed, for the sake of argument only, that the proportion set apart would be subject to the contracts executed by her husband, yet it would be "set apart"

to her *as real property* "in fee simple." The executor would be required to inventory, set apart and account for it as real estate, and the fiction of equitable conversion could not, in the face of the plain language of the statute, be indulged in to defeat her interest. If set apart to the wife as real property, it is submitted the property must *for all purposes* of devolution be stamped with that character.

CAMPBELL, IN HIS NEGOTIATIONS WITH APPELLANTS FOR THE PURCHASE OF THEIR INTEREST IN THE ESTATE OF FERDINAND FENSKY, WAS NOT ACTING FOR HIMSELF OR AS ADMINISTRATOR, BUT OPENLY AND AVOWEDLY AS AGENT FOR JEANETTE FENSKY, THE WIDOW, WHO WAS A CO-HEIR WITH APPELLANTS. THEREFORE THEY WERE DEALING AT ARMS' LENGTH AND NOT AS TRUSTEE AND BENEFICIARY.

Appellants, realizing that they have absolutely failed to prove any fraud on the part of Campbell or Mrs. Fensky toward them, ask the court to *presume* fraud by reason of their claim that the fiduciary relationship of trustee and beneficiary existed between Campbell as administrator and themselves as heirs, and that the burden of proof is upon appellees, as the successors in interest of Mrs. Fensky for whom Campbell was acting, to affirmatively show that he did not commit any fraud, but acted openly and honestly. Appellees submit that, if such were the law, that such burden has been met. But the fallacy of this contention is made

at once apparent by the fact that *Campbell was not acting as administrator, but openly and avowedly as agent for Mrs. Fensky, a co-heir, in his negotiations.* Clearly, the relationship between one heir and another is not that of trustee and *cestui que trust*. *Heirs in buying out the interest of each other deal with each other at arms' length.* This is true whether they act directly or through an agent. Hence Campbell, when *avowedly acting as agent* for one of the heirs in dealing with the other heirs, was dealing at arm's length, just as if the heirs were dealing direct with each other.

Pickens v. Campbell, 179 Pac. 343, 104 Kan. 425;

Herron v. Herron, 71 Iowa 428, 32 N. W. 407;

Elliott v. Higgins, 83 N. C. 459;

Barker v. Barker, 14 Wis. 142.

In Herron v. Herron, *supra*, the administratrix purchased the interest of the father of the deceased who lived in Ireland, upon her own behalf. The property was situated in Iowa. The father was ignorant of the value thereof and negotiated with the defendant, who, by fraud and the fraud of her relatives, misrepresented its value (\$12,000) and induced him to sell it to her for \$1500. The action was brought by the father for the cancellation of the deed, urging that the defendant's position as administratrix created a fiduciary relationship between the parties. But the court held otherwise, saying:

"But clearly, this position is not tenable. Defendant did not occupy a position of trust or spe-

cial confidence towards plaintiff. She did not deal with his attorney in her capacity as administratrix of the estate. On the death of John Herron, the real estate of which he was seized descended in equal shares to plaintiff and defendant. Her interest in the property was a personal interest. In her representative capacity she had no interest whatever. It was a case of tenants in common dealing with each other with reference to the common estate. Neither of the parties was charged with the duty of protecting the rights or guarding the interest of the other in the property. They stood upon an equality, and clearly there can be no presumption of unfairness or fraud in the transaction.” (Pages 407-8.)

It was held in *Elliott v. Higgins*, *supra*, that:

“where an administrator in the settlement with the distributees of the estate gave his individual note for the balance due them, that such note is not a debt created while acting in a fiduciary capacity within the meaning of Rev. St. U. S., sec. 5117, exempting from discharge in bankruptcy incurred by the bankrupt while acting in any fiduciary capacity.”

In *Pickens v. Campbell*, 104 Kan. 425, 179 Pac. 343, the supreme court of Kansas quotes with approval the following statement by the trial court:

“Aside from any facts shown in evidence as to his (Campbell's) uprightness, *this court must presume under the well known rules of law applying to fraud that he was honest and that his dealings were in good faith.*” (Italics ours.)

None of the cases cited by appellants in their attempt to establish that a fiduciary relationship existed between the appellants and Campbell, who was acting openly and avowedly *as agent for Mrs. Fensky* and not *as administrator* in negotiating on her behalf for the purchase of their interests in the estate, are in point. The case of *Michoud v. Girod*, 45 U. S. 503 (4 How. 503), was a case where the executors on their own behalf, but through other persons, purchased property *belonging to the estate*, thereby placing themselves in the *dual position* of acting both for the estate as sellers and themselves as purchasers. That situation, however, does not exist where one heir is selling his or her interest in an estate to another heir.

It is to be noted that the quotation from this case, and from the other cases cited, is to the effect that an executor or administrator is "a trustee for the next of kin, legatees *and creditors*," which makes it clear that the word "trustee" was used loosely and in a very large and broad sense, and not in such a sense as to create a fiduciary relationship, for clearly no fiduciary relationship exists between an administrator and *creditors* of the estate, for otherwise every settlement of the claim of any particular creditor would logically be open to the claim now made by appellants that it is presumed to be fraudulent, and that the burden would be on the administrator to show that the settlement was a fair and just one, etc. Such loose general statements refer only to the relationship between the administrator and *the property of the*

estate in his possession for the safe custody and disposition of which he is responsible, and which he cannot purchase at his own sale. That is quite different from the situation where he, *as an heir*, or as the open and avowed agent of an heir, is negotiating for the purchase, not of any particular property belonging to the estate which he holds the physical custody of, but of the undivided interest of *one of the heirs* in the estate. In such a case he does not act both as buyer and seller.

This is the view adopted in the two decisions of the supreme court of Kansas in *Pickens v. Campbell*, 159 Pac. 23, and 179 Pac. 343, at 345-6, and by District Judge Bledsoe. We quote the following from the opinion of Judge Bledsoe:

“In all that Campbell had to do in the matter of buying out the respective interests of the collateral heirs, *he was obviously acting as the agent of Mrs. Fensky* and entitled to deal, and is now to be considered as having dealt, at arm’s length with those whose interests he was seeking to purchase for his principal. Mrs. Fensky herself might with propriety have been appointed administrator of the estate in Kansas, and in such capacity could, again with the utmost propriety, have sought to purchase and actually have purchased, the interests of the other heirs. In so doing, however, and in the conduct of the negotiations with the heirs incidental thereto, she would have labored under *no such fiduciary relation with respect to the purchase so made, as to cause the court to scrutinize her conduct in relation thereto*

with that nicety that is made use of when a fiduciary is dealing in his trust capacity."

There being no fiduciary relationship existing, the burden is clearly upon appellants to prove their charges of fraud. Fraud is not to be presumed.

Braddock v. Loucheim (C. C. A.), 87 Fed. 287;

Wright v. Grover, 27 Ill. 426;

Ferguson v. Little Rock Trust Co., 99 Ark. 45,
137 S. W. 555;

Ruby Co. v. Jamison, 136 S. W. 909, 910.

Charges of fraud must be clearly made out.

Braddock v. Loucheim, *supra*.

Lapse of time, particularly where the parties to the alleged fraud are dead, operates and adds to the presumption in favor of innocence and against the imputation of fraud.

Prevost v. Gratz, 6 Wheat. 481.

THE PURCHASE BY THE WIDOW OF THE INTERESTS OF APPELLANTS IN THE ESTATE OF FERDINAND FENSKY WAS IN THE NATURE OF A FAMILY SETTLEMENT OR COMPROMISE OF SAID ESTATE. SUCH CONTRACTS ARE HIGHLY FAVORED BY COURTS OF EQUITY, AND WILL NOT BE LIGHTLY SET ASIDE.

The rule is well stated in the following extract from Burnes v. Burnes, 132 Fed. 485, at p. 494:

"Whether the settlement was what a court of equity would have decreed is not the question.

It was an agreement of settlement, and was supported by a consideration. It was a family settlement, and such settlements are seldom corrected or canceled. In 2 Pom. Eq. §850, it is said:

‘Compromises, where doubts with respect to individual rights, especially among members of the same family, have arisen, and where all the parties, instead of ascertaining and enforcing their mutual rights and obligations, which are yet undetermined and uncertain, intentionally put an end to all controversy by a voluntary transaction in the way of a compromise, are highly favored by courts of equity. They will not be disturbed for any ordinary mistake either of law or of fact, in the absence of conduct otherwise inequitable, since their very object is to settle all such possible errors without a judicial controversy.’

For reforming or canceling a contract, courts require stronger proofs in cases of family settlements than in any other, and will even hunt for reasons to sustain such contracts, to the end that family secrets, disputes, and wranglings may be kept from the gaze of a curious and gossiping public. The law is stated by Justice Story, in his work on Equity (section 132):

‘There are cases of family compromises, where upon principles of policy, for the honor of peace of families, the doctrine sustaining compromises has been carried further: and it has been truly remarked that in such family arrangements the court of chancery has administered an equity which is not applied to agreements generally. *Such compromises*, fairly and reasonably made to save the honor of a family, as in case of suspected

illegitimacy, to prevent family disputes and family forfeitures, are upheld with a strong hand, and are binding when in cases between mere strangers the like agreements would not be enforced.' ”

That case was affirmed by the circuit court of appeals (8th cir.), 137 Fed. 781, where the rule is stated as follows:

“For obvious reasons of public policy, compromises of conflicting claims by family settlements are encouraged by the courts, and they may not be avoided or disregarded for mere inadequacy of consideration, or except upon clear and convincing proof of grave fraud or mistake. *Stapilton v. Stapilton*, 1 Atk. 2; 2 *White & Tudor's Lead. Cas. in Equity*, pt. 2, p. 920; *Supreme Assembly v. Campbell*, 17 R. I. 402, 22 Atl. 307, 13 L. R. A. 601; *In re Palethorp's Estate*, 168 Pa. 101, 31 Atl. 885.”

137 Fed. 801.

See also:

Martin v. Martin (Ark.), 135 S. W. 348, and cases therein cited.

(3) *The assignments from appellants to Jeanette Fensky were procured by Campbell in good faith and with the honest belief that the interest of Ferdinand Fensky in the lots covered by said contracts constituted realty, and therefore were not obtained by fraud.*

Assuming, for the purpose of argument only, that a fiduciary relationship had existed between Campbell and appellants, and that the burden was upon the

defendants to show the absence of fraud in Campbell's dealings with appellants (which is not the case),—that burden, we submit, has been met by the preponderance of the evidence in this case, to the effect that Campbell acted honestly and in good faith and without any fraud upon appellants.

We quote the following statement and extracts from the correspondence between Campbell and Goodrich, the attorney administering the estate of Ferdinand Fensky in California, which is set forth in the opinion in *Pickens v. Campbell*, 179 Pac. 343, and which shows, as is there held, that Campbell at all times, not only honestly, but correctly, believed that Ferdinand Fensky remained the owner of the lots covered by the sales contracts, and that such lots went to the widow as realty, and that he was not actuated by any fraudulent motives:

“The record in this case vindicates not only Mr. Campbell's ability as a lawyer, but the good faith of his conduct and his sagacity as a business man. On September 4, 1903, John V. B. Goodrich, an attorney at San Pedro, Cal., wrote Mr. Campbell a letter advising him of Mr. Fensky's death and intestacy while resident in California, stating that Mr. Goodrich had been employed by Mrs. Fensky to settle the estate, and on behalf of Mrs. Fensky requesting Mr. Campbell to act as administrator of the portion of the estate situated in Kansas. On September 8th, Mr. Campbell replied, consenting to act as administrator. He was already familiar with the Fensky interests here and at the threshold of the contemplated

administration was the question of what was real estate, descending to the widow according to the law of Kansas, free from interference by the administrator, unless needed for payment of debts, and what was personal property, to be inventoried and administered, but finally to be distributed according to the law of California. So far as known, Mr. Campbell had never even heard of Mr. Goodrich before, and, writing, as one lawyer to another, he said:

‘Of course, all his real estate here will go to her under our statute, but I suppose all his personal property, which will include all notes and mortgages, will descend under the law of California. Is not that your understanding?’

‘An administrator here is quite necessary in view of the many mortgages and land contracts he left. * * * and, if the administrator can act in the capacity of agent generally for her, it would simplify matters and perhaps be less expensive. * * *

‘Give me your views of Mrs. Fensky’s relation to the land and lot contracts for deed; if she is now the sole owner of the lands, and I think (without investigating the question) that she is, ought she not either to make new contracts in her own name, or give deed and take back mortgages for balances of purchase money? * * *

‘Is it at all probable that the brothers and sisters will make any claim to the contracts for deeds for property here? As soon as I am appointed administrator I will be besieged, and I want to know your view on some of these important questions before expressing my opinion.’

On September 14th, Mr. Goodrich replied, and among other things said:

‘You ask me to give my views of Mrs. Fensky’s relation to the land and lot contracts for deeds. My opinion is that Mrs. F., under your laws, is now the sole owner of said lands. * * *

‘In relation to the brothers and sisters making any claim to the contracts for deeds, Mrs. F. says that she cannot tell what they will do; but so far as the personal property is concerned, and also the land here, I have advised her to compromise with and get their receipts in full for what interest they may have in the estate. If you have any suggestions to make along the line of such a compromise, please do so, and assist us in bringing the same about.’

On September 18th, Mr. Campbell wrote Mr. Goodrich as follows:

‘I agree with you that the land contracts for deed are not personal property, but that Mrs. Fensky is the sole heir at law, and now the sole owner in fee of all the Kansas real estate, including that contracted to be sold, but subject, of course, to debts, if any, of deceased, and the rights of contracting purchasers, and thus we will treat the matter. * * *

‘So far as the real estate here is concerned, she became absolute owner of it in fee upon her husband’s death; and without reference to any probate proceedings, whether an administrator was appointed or not, she can do as she pleases with it, subject all the time and only to the claims of creditors, and we all know there are no creditors. * * *

‘I think your idea of having Mrs. Fensky buy out the other heirs is a good one. It will simplify matters and shorten up the proceeding.’

179 Pac. 345-6.

The supreme court of Kansas, in *Pickens v. Campbell*, after setting forth the above correspondence, says:

“It thus appears that both lawyers, each acting independently of the other and on his own judgment, arrived at the same conclusions respecting the status of the real estate contracts. *There is not the slightest doubt that each one expressed his honest opinion. Both men were right, and, in settling with the heirs, representations as to the nature and value of the distributable estate were neither false nor fraudulent because the real estate contracts were not recognized as part of the personalty.*

Having determined that the contracts were not personal property, and that the land affected belonged to the widow, Mr. Campbell exercised great prudence in preventing information respecting them from being noised about. To be blunt about it, he sedulously concealed their existence, as far as he could, and for the soundest business reasons. The circumstances were such that it would have been financially disastrous to involve the contracts in litigation. Covetous relatives of the deceased with everything to gain and nothing to lose, and possibly having exaggerated notions of Mr. Fensky's wealth, would be likely to find lawyers who would institute speculative suits for them, just as occurred ten years later. As admin-

istrator, Mr. Campbell occupied no relation of trust or confidence toward distributees of personality, with respect to real estate owned by the widow. He rested under no duty to such distributees to produce the contracts or to give information or advice concerning them; and the remarks of the learned trial judge, in a written opinion filed in connection with the decision of the case in the district court, are pertinent here:

'The matter of the character of Fensky's interest in these properties in Shawnee county was open for the investigation of any of the heirs. It was in fact investigated by Fred Fensky of Leavenworth, and by his attorney, and after such investigation the attorney evidently came to the same conclusion Campbell did. * * *

'Would a court be warranted in holding that Campbell was guilty of fraud under such circumstances? Unfortunately, before the trial of this cause he died. He is not here to tell his side of the story. It appears that he was a lawyer in good standing at the bar for many years. Aside from any facts shown in evidence as to his uprightness, this court must presume, under the well-known rules of law applying to fraud, that he was honest and that his dealings were in good faith. It would be an unjust thing to blacken his character by a finding of fraud on his part because he believed that under the law this property belonged to Mrs. Fensky, and acted upon that belief. This court will not give support to so unjust a contention.' " (Italics ours.)

We wish also to call the court's particular attention to the following extract from the first case of *Pickens v. Campbell* (98 Kan. 518, 159 Pac. 21):

"The petition contains nothing to suggest a different rule here, but, *if the evidence should show that the administrator believed that the notes therein referred to followed the rule of real estate and became the property of the widow, no statements made by him in good faith by reason of that belief, however incorrect from a legal point of view, would warrant a reopening of the administration.*"

159 Pac. 23.

In *Dowdall v. Cannedy*, 32 Ill. App. 207, it was held that an honest expression of opinion as to the law, made by an executor in negotiating the purchase for himself of the interest of one of the heirs, even though erroneous, did not constitute fraud, nor justify the setting aside of such purchase.

The lower court in the case at bar, after reviewing all of the evidence, upheld the *good faith and honesty of Mr. Campbell*. We quote the following extracts from the decision:

"*So far as Campbell was called upon to and did deal in his purely fiduciary capacity, I am persuaded from a careful consideration of all of the evidence that he was at all times actuated by honest and bona fide motives. He believed genuinely, as the Supreme Court of Kansas in the case brought against him and his bondsmen has since said he had a right to believe, that the land contracts entered into by Fensky and*

joined in by the wife, did not serve to operate as an equitable conversion of the titles to the respective properties, and did not serve in any way to convey the legal or equitable titles to the realty described therein." [Tr. p. 195.]

"In my judgment, Campbell, assuming that the law of Kansas did regard the precise contracts under consideration here as failing to divest the Fenskys of the title to the realty, was correct and he displayed commendable judgment in the attitude that he took. It is apparent that Campbell, all through the course of the proceedings and as is evidenced by his letters written, was anxious to avoid any controversy in court respecting the matter, for one reason and another; but that he was thoroughly imbued with the idea that if such a controversy should arise, the rights of Mrs. Fensky, as he had stated them, would be sustained. This is made especially apparent in the language contained in his letter of February 25, 1905, in evidence and which is fairly illustrative of his entire course of conduct. If there was no fraud on his part in this behalf, as I am constrained to hold, then no wrong has been done to any of the complainants in the premises.

The persons who sold their interests in the estate to Mrs. Fensky were in no wise imposed upon. They had plenty of opportunity to discover the exact nature of the holdings of those who were occupying the lands in the Fensky addition; no impediment was placed in their way in the matter of securing complete information with respect to the precise character of the transactions which had enabled such persons to take possession of the property. They must be held to have been

concluded by the assignments given by them to Mrs. Fensky and by the action of the Probate Court in Shawnee county based thereon." [Tr. pp. 197-8.]

The language referred to contained in Mr. Campbell's letter of February 25, 1905, referred to by the court in the foregoing extract, is as follows:

"The fact is that although the deeds were *signed* before Fensky's death, the title did not pass to the purchaser till the deed was *delivered*. The title did not pass to the grantee until *after* it descended to you by virtue of Ferdinand's death and of course as the title (the land) descended to you all the proceeds therefrom afterwards (& the notes mtges) were your individual property. So we want to treat the Addn property just as we do the Goff, the Pruessner & the Rost properties & just as tho' there were no contracts of sale in existence—simply treat all of it as real estate that Ferdinand died seized of & which went to you as his sole heir at law & of course which you can do as you please with." [Tr. p. 433.]

"If Frederick should ever raise the question in court I think we can beat him but we want to avoid any contest if possible. I have had in view all the time the avoidance of any lawsuits, but I think it will not prejudice a settlement any with Frederick for you to say something like what I have penciled in regard to the Ks Adm'r." [Tr. p. 433.] (Italics ours.)

A similar statement is found in Campbell's letter of November 12, 1903, as shown by the following statement:

"The only thing that I am at all afraid of there being any trouble over is the Addition contracts. I am

a little afraid that the heirs may *claim* them as *personal property*, although I have not had a hint of anything of the kind as yet from any source, *and I don't believe that the court would so hold if the question was raised, but I would feel safer if the Addition people would take the deeds that you and Fred made and which, of course, when recorded, would appear as if the title passed all right while Fred was still living, but they don't seem to care about doing so and of course I cannot urge it.*" [Tr. pp. 363-4.] (Italics ours.)

Again, on November 23, 1903, Mr. Campbell writes:

"I don't know that any of them will ever claim that the Addn-contracts are a part of the personal estate and subject to the California law, but it is too early yet to tell what they will claim. And if they do make such a claim, I think we can defeat them, *but I want, if possible, to save the trouble and expense even of defeating them.*" [Tr. pp. 367-8.]

Again, on May 26, 1904, Mr. Campbell writes:

"I don't fear any contest unless some of the heirs get the *fool notion* in their heads that the lot and land contracts are *personal property* and subject to division." [Tr. pp. 383-4.]

In passing, we wish to call the court's attention to the fact that the case of *Brown v. Thomas*, 37 Kan. 282, 15 Pac. 211, arose in Shawnee county, in which Mr. Campbell resided, and undoubtedly stood out prominently in his mind, which accounts for his statement in his first letter to Mr. Goodrich that the widow "is now the sole owner of the lands * * * (without investigating the question) * * *."

The claim of appellants that Campbell's conclusion as to the effect of these contracts, was not rendered in good faith, but with the fraudulent and corrupt purpose of enabling the widow to buy out the interests of the collateral heirs for a sum smaller than what they would be entitled to upon distribution, is conclusively answered by the record, which shows that expressed, was: "It will simplify matters and shorten up the proceedings." [Tr. p. 339.] It was not until later that Mrs. Fensky determined to do so. [Tr. pp. 350-354.]

The claim of appellants that the failure of the petition filed by J. W. McClure for the appointment of Mr. Campbell as administrator to mention the collateral heirs, indicates a fraudulent purpose *on the part of Mr. Campbell*, is conclusively answered by the following reasons given by him for the failure to mention the brothers and sisters: "I thought it time enough to call attention to brothers and sisters when it was fully determined whether there was anything *here* to 'distribute' to the brothers and sisters." [Tr. p. 339.] "Time enough for *me* to have the names of the 'heirs at law' after it is determined whether the Stoker money must be distributed here, or whether I may send it to the California administrator to distribute." [Tr. p. 350.] The Stoker money was the only property in Kansas at the time of the death of Ferdinand Fensky to be administered upon. [Tr. pp. 293-4.] The notes and mortgages included in his inventory having been sent to Kansas for administra-

tion as a matter of convenience after the death of Ferdinand Fensky. [Tr. pp. 294, 338, 345-6, 352, 357.]

Appellants' claim that Campbell's acting as "agent" for the widow, Mrs. Fensky, is an indication of a fraudulent intent as against appellants, is conclusively answered by the fact that the correspondence clearly shows that the reason for such agency was in connection with the real estate which descended direct to the widow without any reference to any probate proceedings [Tr. p. 337], of which there was a great deal needing someone to collect rents, make repairs, collections, etc. That this is clearly the purpose of such agency is indicated by the following references to the record: [Tr. pp. 330, 333, 346, 348], which shows that such agency was created before the widow had determined to buy out the interests of the collateral heirs. [Tr. p. 350, 354.] In Mr. Campbell's letter of September 30, 1903, he states: "As agent for Mrs. Fensky can sell and rent her real estate and report to her in her individual capacity for proceeds." [Tr. p. 348.] "When I collect rents, or proceeds from sale of real estate I will give receipt in name of J. Fensky, owner, by her agent M. T. Campbell." [Tr. 346.] There certainly was no impropriety in Mr. Campbell acting as agent for Mrs. Fensky in connection with her Kansas real property, particularly in view of the fact that there were no debts, and no possibility that any of it would ever have to be sold for the payment of debts. The entire record shows that Mr. Campbell carefully and scrupulously [Tr. pp. 461-505] kept his accounts and

in all his actions clearly designated the capacity in which he was acting.

(4) *Appellants knew of the existence of the contracts for the sale of lots in Fensky's Addition, and hence there was no concealment of their existence.*

We will not here re-state the many facts and circumstances showing that appellants had actual knowledge of the existence of these contracts. The facts and circumstances showing such knowledge, with the references to the record, are fully set forth in the statement of facts and again in what is hereafter said upon the subject of the statute of limitations and laches. This was the conclusion reached by the supreme court of Kansas (*Pickens v. Campbell*, 179 Pac. 343 at p. 346), and also by Judge Bledsoe. [Tr. p. 198.] Knowing of the existence of these contracts, as must be held upon the evidence, appellants are charged with a knowledge of their legal effect. Assuming for the sake of argument only, that Campbell had wilfully misrepresented to appellants the legal effect of these contracts, such would be a misrepresentation of a matter of law which could not constitute fraud.

Coddington v. Pensacola & G. R. Company, 103 U. S. 409.

(5) *Appellants' claim that because of the failure of Campbell, through an honest mistake as to the law, to inventory and account for the sales contracts, they would be entitled to relief in a court of equity to administer such contracts as unadministered assets, is wholly without merit.*

Appellants assigned their interests to all of the estate of Ferdinand Fensky to the widow Jeanette

Fensky. The probate courts in Kansas and in California distributed such interests as appellants would otherwise have had, to Jeanette Fensky, based upon such assignments. Such contracts being within the state of California at the time of the death of Ferdinand Fensky, even if appellants' contention as to the law could possibly be sustained, it would be personal property subject to distribution by the probate court in California. The decree of distribution of the probate court in California of the estate of Ferdinand Fensky distributed the property therein specifically described and "*all other properties belonging to said estate whether described herein or not.*" [Tr. p. 642.]

Unless the assignments of appellants' interests in and to all of their respective right, title and interest "in and to the real and personal property wherever located of Ferdinand Fensky, deceased" [Tr. p. 585] are set aside—which could only be upon the ground of fraud—they would not be entitled to any of his unadministered assets. They must therefore establish their claim of fraud to set aside such assignments. An honest mistake as to the law would not constitute fraud. Therefore, it follows conclusively that such honest mistake would not justify the setting aside of such assignments, which must be done in order to entitle appellants to any relief. For these reasons, the principle set forth in *Griffith v. Codey*, 113 U. S. 89, to the effect that "a settlement of administrator's account by the decree of a probate court, does not conclude as to property accidentally or fraudulently with-

held from the account," is not applicable or in point. Clearly, appellants having parted with their interests in the estate, including unadministered assets, they would not be entitled to invoke such principle.

B. THE OTHER CHARGES OF CONCEALMENT AND MISREPRESENTATION OF ALLEGED ASSETS OF THE ESTATE OF FERDINAND FENSKY ARE WITHOUT FOUNDATION, AND THERE WAS NO FRAUD IN CONNECTION THEREWITH.

As will be noted from the statement of facts hereinbefore set forth, the succeeding items hereinafter discussed are all comparatively small and would not appreciably increase the value of the undivided one-sixteenth interest of appellants, nor materially affect the adequacy of the consideration received by each of them.

(1) *The Stein, Sims and Kimmerly notes were not a part of the estate of Ferdinand Fensky, having been given to Jeanette Fensky in her husband's lifetime; and there was no fraud on the part of Campbell in failing to inventory the same.*

The correspondence shows that *the Kimmerly note* was executed to Mrs. Fensky in May, 1904. On April 2, 1904, Campbell writes to Mrs. Fensky as follows:

"By the way, does George [Kimmerly] still owe you anything on old indebtedness? I told Laura once to settle with him on the theory that whatever he owed was due to you individually (and that I would pay no attention to it as administrator). But if he does owe

you anything, would like to turn it in on the grading expense" [Tr. pp. 377-8], to which inquiry Mrs. Fensky replied:

"He has never settled with me yet nor given me any account of what he owes me. But his daughter wrote me that he will pay me as soon as he can. As I have no writing whatever, I shall have to trust to his honesty." [Tr. p. 378.]

On January 5, 1905, Mrs. Fensky wrote to Mr. Campbell as follows:

"About the Paramore place, the least I could take for that would be \$2800. I do not see how Mr. Kimmerly could buy it, since he can't pay the \$300 which he owes me" [Tr. p. 421], to which Mr. Campbell replied:

"You say you do not see how Kimmerly can buy the place, as he cannot pay the \$300 he now owes, and I think you are correct in your surmise. * * * By the way, did you give him credit on his due bill for the \$10 balance due on bond?" [Tr. pp. 424-5.]

There is absolutely nothing in the record indicating that this indebtedness of \$300 was not the individual property of Mrs. Fensky, as the foregoing correspondence indicates.

The only thing in the entire record which appellants can point to supporting their claim that the Kimmerly note belonged to the estate and not to Mrs. Fensky individually, is the statement of Campbell above quoted that the money was due to Mrs. Fensky "individually" and that he would "pay no attention to it as administrator." [Tr. p. 377.]

In regard to *the Stein notes*, one for \$2400 and the other for \$300: These were both in the possession and control of Mrs. Fensky. Mr. Campbell, who has been the family attorney for years prior to the death of Ferdinand Fensky, and who had a more thorough knowledge of Mr. Fensky's financial affairs and business in Kansas than anyone else [Tr. pp. 302, 320, 329], sent an undated post-card to Mrs. Fensky upon which appears the following:

“Did not Fred give you the Stein notes before he died? If so, they do not belong to the estate and should not be inventoried as part of the estate. Any notes that he turned over to you, whether he indorsed them or not, are your separate individual property, and you must be sure and call Judge Goodrich's attention to all such cases so that he will not put them in as part of the estate. See?” [Tr. p. 351.]

The date of this post-card is fixed by the diary referring to having written Mrs. Fensky under date of September 29, 1903. [Tr. p. 454.] Certainly, it must be presumed that Mr. Campbell from his knowledge of the family affairs, felt pretty sure that the notes had been given to Mrs. Fensky by Mr. Fensky *before* he died, and she being the widow—not knowing more than most women know about such matters,—he cautioned her that notes so given to her were her individual property and should not be included in the estate. Appellants try to make a mountain out of the use of the word “See.” Nothing more was meant by this than if he had said, “Do you understand?”

Certainly Mr. Campbell's statement is more consistent with an honest purpose than with a fraudulent one; and the rule is well settled that statements which are as consistent with an honest purpose as with a fraudulent one, are not to be regarded as fraudulent. See note 33 L. R. A. (N. S.) 840. Particularly should this be true where the parties are dead and helpless to answer the imputation against their honesty. Mr. Campbell was right in his view of the law, for it is well settled that a gift of a negotiable instrument may be made by a mere transfer of possession of the instrument without indorsement.

California Civil Code, Sec. 1052;

Edwards v. Wagner, 121 Cal. 376;

First National Bank v. Moore, 137 Fed. 505,
507 (C. C. A. 9th Cir.).

A promissory note payable to order but not indorsed may be the subject of a gift *causa mortis*, and such a gift carries with it the mortgage by which the note is secured.

Druke v. Heiken, 61 Cal. 346.

It is claimed that Mrs. Fensky's letter to Stein asking him to give her a new note in place of the old ones and to date it back, is evidence against Mr. Campbell of a fraudulent purpose. There is nothing to show that he knew that Mrs. Fensky was writing, or ever wrote, to Stein; but, on the other hand, Mr. Goodrich informed Mr. Campbell that these notes had been

turned over to her by her husband. [Tr. p. 354.] Mrs. Fensky's letter to Stein does not show any fraud on her part. Such action on her part is perfectly consistent with the fact that Fensky had transferred and given her these notes before he died, and she, knowing them to be her property, desired to have her right in them evidenced by a new note in her own name, and bearing date as of the time they were assigned to her. The reference in the letter to the effect that she would not have to enter a new note into court, was probably due to a misunderstanding of Mr. Campbell's statement in his post-card cautioning her to call her lawyer's attention to all cases where notes had been turned over to her, so that they would not be inventoried in court as a part of her late husband's estate. Her letter being consistent with an honest purpose, and no question being raised by anyone while she was alive, and had an opportunity to explain her statement, and there being no evidence that these notes were not given to her by Mr. Fensky, an honest rather than a fraudulent purpose should be inferred. (33 L. R. A. N. S. 840, and cases cited.) It certainly seems strange, in view of the fact that Mrs. Fensky turned over to Mr. Campbell the numerous notes and mortgages which were inventoried by him, that she only claimed the Stein and the Sims notes to have been given to her by her husband. If she had been prompted by a fraudulent motive, she undoubtedly would have retained and made a claim as to the large amounts.

In regard to the Sims note, Mr. Campbell wrote to Mrs. Fensky as follows:

"Remember I am treating the Sims note as yours. Any notes that F. turned over to you before he died, whether he endorsed them or not, you have a right to claim as your own property." [Tr. p. 286.]

The above was written on a torn calendar leaf of August, 1903, but it was written much later than August 3, 1903, and apparently was never sent to Mrs. Fensky, for it speaks of settling with Sims about repairs, and on the next day, January 8, 1904, Mr. Campbell wrote to Mrs. Fensky a letter saying that he settled with Sims for repairs 'yesterday.' [Tr. p. 374.] These repairs were on real property belonging to Mrs. Fensky individually which Campbell had on September 28, 1903, advised her to have made and to take credit on the note which he owed her. [Tr. pp. 348, 349, 417.] This note was sent to Mr. Campbell on September 16, 1903, by Mrs. Fensky to secure the renewal of a chattel mortgage. [Tr. pp. 335, 359.] Mrs. Fensky received \$300 in payment of this note. [Tr. p. 420.] She had previously allowed him credit on his note for \$106.90 on account of repairs upon her individual real property. [Tr. p. 374.]

Mr. Sims testified that he had borrowed money from Ferdinand Fensky prior to his death and had dealt with Matt Campbell acting as attorney for Ferdinand Fensky. [Tr. p. 320.] He does not state whether or not the money that he borrowed was repaid or not, and there is nothing in the record to show that the

Sims note was payable to Ferdinand Fensky or that it was to secure the payment of the money which Mr. Sims mentioned as having borrowed. Mr. Campbell, who had represented Mr. Fensky and the widow, at all times consistently treated this note as belonging to Mrs. Fensky individually. There being nothing in the record to contradict their positive statements and consistent actions that this note belonged to Mrs. Fensky individually, appellants' claim, based upon mere conjecture that this note belonged to the estate of Ferdinand Fensky, is not established by the evidence and is contrary to the evidence.

(2) *That portion of the balance in the Citizens State Bank of Topeka, Kansas, which after being divided by Mr. Campbell was sent to Mrs. Fensky, belonged to her individually and not to the estate of Ferdinand Fensky.*

The record does not show, as appellants state, on p. 113 of their Brief, that "when Ferdinand Fensky died \$942.82 stood to his credit on the books of the Citizens State Bank of Topeka, Kansas." The record clearly shows that this was the balance on hand on October 5, 1903, about two months *after* the death of Ferdinand Fensky. On September 24, 1903, Mrs. Fensky, through her attorney, requested Mr. Campbell to "get what money there is paid in upon the contracts" and to send the same to her, as she was in need of money, Mr. Goodrich stating in his letter that "*as there is no question but that Mrs. F. is entitled to the money upon*

these contracts, I can see no reason why the money could not be paid to her." [Tr. pp. 355, 343.] The record shows that on October 5, 1903, the balance of \$942.82 was divided by Mr. Campbell, and \$913.50 was sent to the widow as her individual property, \$27 being retained by him as administrator of the Fensky estate. Mr. Campbell in his letter of October 6, 1903, says:

"Of this amount I think \$913.57 belongs to Mrs. Fensky and \$27 to the Fensky estate, and therefore took drafts payable to her for \$913.57, which find enclosed, one for \$886.57, and one for \$27." [Tr. p. 355, 454.]

The record shows that Mr. Campbell receipted to the bank for \$913.57 as *Agt. of Jeanette Fensky*, and at the same time receipted for \$27, "for the administrator of the estate of F. Fensky, deceased." [Tr. pp. 309-310.] The assistant cashier of the bank testified that "in 1903 Ferdinand Fensky had no account" in the Citizens State Bank. [Tr. p. 309.] From the fact that the bank accepted receipts for the money as provided by Mr. Campbell, it must be presumed that the officials of the bank were satisfied in view of the necessity for the bank to protect itself, and that Campbell was satisfied that the moneys receipted for by him as agent for Mrs. Fensky and sent to her, were actually paid in from the real estate or upon the land contracts belonging to the widow *subsequent* to the death of Ferdinand Fensky. Considering that there were 29 of such contracts, and much real estate not covered by contracts,

and that two months elapsed between the death of Ferdinand Fensky and the dates these moneys were withdrawn, the amount credited to Mrs. Fensky individually is not disproportionate. The only thing in the entire record that appellants can seize upon as indicating that the money sent to Mrs. Fensky belonged to the estate, is that Campbell in a letter refers to the aggregate amount of the balance in bank, including the money belonging to Mrs. Fensky individually and the money belonging to the estate of Fensky as being a balance "due Fensky." It is quite obvious that some of the money being due to *Mrs. Fensky* individually and some to the *estate of Ferdinand Fensky*, that the reference to the aggregate balance as money being "due Fensky," is not inaccurate. It was undoubtedly used for the sake of brevity. If Mr. Campbell had believed or thought that the money belonged to the "Estate of Ferdinand Fensky," he would have used those words. The only other bit of evidence relied upon by appellants is a statement of the assistant cashier that his recollection was that these checks were "in the estate of F. Fensky, M. T. Campbell, administrator." But this statement when considered with his previous statement that in 1903 Ferdinand Fensky had no account in the bank, indicates quite clearly that the moneys were paid in after the death of Ferdinand Fensky. The statement of the cashier upon his "recollection", however, is inconsistent with the written receipts given to the bank at the time of the withdrawal of the money by Campbell, *as agent of Jeanette Fensky*.

There is no evidence whatever that Mrs. Fensky received the money from this bank *as administrator*. So far as Mrs. Fensky, Mr. Campbell, and the bank were concerned, they being the only parties having any knowledge as to the source of the moneys, there was no question but that *Mrs. Fensky was lawfully entitled to her individual right to the money sent her*. There is no showing whatever that they were not right.

(3) *There was no fraudulent undervaluation or misrepresentation of the value of the California realty.*

On this head of appellants' case, there was no representation at all made to appellants as to the *actual value* of the California realty, but merely a statement that it was *appraised* at so much, which was literally the truth. [Tr. pp. 294-306, 526-9, 634-9.] The statement given by Campbell to Mr. Kraus to be shown to appellants [Tr. p. 267] stated the "*appraised*" valuation of real and personal property exactly as it was actually appraised by the three court appraisers in California, and strictly followed the information given to Mr. Campbell by Mr. Goodrich [Tr. pp. 370-372], which was the only information which it appears from the record Mr. Campbell had on the subject.

This statement was seen by Mrs. Pickens while in the hands of Mr. Kraus [Tr. p. 280], upon whom she depended in her negotiations. Mrs. Pickens stated that she was "little acquainted with M. T. Campbell in his lifetime," and that "What I knew about the estate I learned from Mr. Kraus." [Tr. p. 279.]

Mr. Kraus testified "that statement handed to me by Mr. Campbell purported to give an appraised valuation of all of the real and personal property of Ferdinand Fensky in California."

Obviously, unless Mr. Campbell, Judge Goodrich or Jeanette Fensky are connected in some way with procuring the alleged under-appraisal, the mere fact that there was actually an under-valuation by the three appraisers, is immaterial. There is absolutely no showing of any such connection. The three appraisers who appraised the California real property were appointed by the court, and they took an oath to honestly and fairly appraise said property. They were all dead before the trial. They made their appraisal and it was accepted by the court. No connection between any of them and either Mr. Campbell, Judge Goodrich or Jeanette Fensky was shown, so that any connection on the part of any of these persons with the appraisal of the California real property, must rest wholly upon conjecture, unaided even by a suspicious circumstance.

We do not concede that the appraisal made by the court appraisers were below the actual value of the California real property. The values as fixed by the appraisers are not lower than the assessed valuations shown on the tax receipts in evidence. [Tr. p. 643.] At most, the discrepancy between the appraisements and the values at that date were not of a very marked or material character. For instance, the witness Hansen, who testified that lots 9 and 10 of Peck's Subdivision of San Pedro "were worth" in October,

1903, \$10,000, admitted on cross-examination that Judge Goodrich, early in 1903, had bought the lot adjoining these two lots for \$1200. [Tr. p. 523.] These two lots were purchased by the deceased in May, 1902, for \$2025. [Tr. p. 630.] Lots 19 and 20 in Block C of Peck's Subdivision were situated about "half a mile from the main part of town" in a new subdivision without any houses in it and on a street which had been plowed and curbed and right across the street from a cemetery. It also appears that there was a boom in San Pedro which began in July, 1903, continuing into 1904, lasting about a year.

Mr. Hansen said that these lots "were worth" \$4000. [Tr. p. 523.] Mr. Fensky bought them at auction during the "boom" for \$2362.50 [Tr. p. 631], but from the location of the property and in view of the fact that the boom was so short-lived, we are not certain but that the appraisal made by the three court appraisers more truly represented the *actual value* of the lots than the fancy figure of the real estate agent made years afterwards and what Mr. Fensky thought they were worth in the excitement of the auction in the boom days.

The 60 acres in Orange county which was appraised by the appraisers for \$1400 [Tr. p. 528] was assessed for taxation purposes for only \$1350. [Tr. p. 644.] The testimony of the witness Head, made 15 years later, that the property was then worth forty to fifty dollars an acre—or about double the appraised value—

is not to be depended on, for he admitted on cross-examination that the Pacific Electric Railway came into that district in 1905, causing values of property in that district to go up “like a skyrocket.” [Tr. p. 606.]

No evidence was offered by appellants showing that the appraisement of the other parcels of the California real property were not accurate. This fact is significant in a way, as to the accuracy of the appraisers’ entire report, as compared with the opinion of expert witnesses “employed” 15 years later to give their opinion as to market values fifteen years previously.

Lots 9 and 10 in Peck’s Subdivision above referred to, which is the chief item which appellants claim was under-appraised, were set apart by judicial decree to the widow as a homestead in a statutory proceeding in rem upon statutory notice, under the provisions of sections 1464-1468, California Code of Civil Procedure. [Tr. pp. 632-634.] This was in the early part of November, 1903, long before the negotiations by Jeanette Fensky to purchase the interest of appellants in the estate of Ferdinand Fensky.

If there was any undervaluation as to such land, it was intrinsic fraud, for, under the statute, the widow was entitled to have land only to the value of \$5000 set apart to her as a homestead, and in her petition she claimed honestly that the value of this property was less than \$5000, and the court in entering this judgment setting apart said property as a homestead

to her, necessarily passed upon the truthfulness of her representation as to its value.

Fealey v. Fealey, 104 Cal. 354, at pp. 358-359;

Warren v. Ellis, 39 Cal. App. 542;

United States v. Throckmorton, 98 U. S. 61.

It appears clearly from the record that appellants had actual notice of this proceeding. [Tr. p. 27.] Nothing whatsoever was done to prevent them from contesting the allowance of the property to the widow as a homestead. Said judgment is conclusive and binding as to the value of the property, and also that the title to the land set apart to her was community property.

In Fealey v. Fealey, *supra*, it was claimed that the defendant made a false statement in her petition, and also on the witness stand, *as to the nature of the title to land set apart to her as a homestead*. The court, in disposing of this contention, said:

“ * * * but the question of title thus presented and sought to be litigated in this action was necessarily involved in the proceeding to set apart the homestead, and the order or judgment of the court therein was a determination that the allegation of defendant's petition in regard to the nature of the title to the land so set apart was true, and that her testimony relating to the same matter given upon the trial of that proceeding was also true. The plaintiff had notice of the pendency of that proceeding, and no fraud was practiced upon her by which she was prevented from appearing

therein and contesting the allegation of defendant's petition, or showing that the testimony given by her was unworthy of credit. Under these circumstances that judgment is conclusive upon the plaintiff, and she cannot be permitted to bring into litigation the same matters therein involved and settled by that judgment. The case made by the complaint here falls exactly within the rule declared in *United States v. Throckmorton*, 98 U. S. 61; *Griffith's Estate*, 84 Cal. 113; and *Pico v. Cohn*, 91 Cal. 129, 25 Am. St. Rep. 159."

Under the provisions of section 1468, California Code of Civil Procedure, the property that was set apart to the widow as a probate homestead became hers absolutely, there being no minor children. Therefore, any undervaluation in the appraisement or any alleged representation thereafter made by appellants as to its value, is not material.

The claim that Jeanette Fensky, as administratrix, failed to inventory an alleged contract of sale for a part of the Orange county property is likewise without merit. The inventory filed shows that the real property covered by this alleged contract was included in the inventory as real estate. [Tr. p. 528.] In view of the fact that *the law of descent in California* (Sec. 1386 Cal. Civil Code) *is the same for real and personal property*, no one was injured in so doing. It does not appear, however, what the terms of the alleged contract were, same having been lost [Tr. p. 605], or whether or not it was such a contract as could be specifically enforced under sections 3274, 3390, Civil Code.

Furthermore, this is not one of the grounds of recovery alleged in the bill of complaint; no issues were raised as to this subject; and the claim is a straw grabbed at as a pure afterthought.

(4) *The balance in the joint bank account and the certificate of deposit in their joint names, if not the property of Jeanette Fensky before the death of her husband, become her property by right of survivorship upon the death of her husband.*

The record shows that the money on deposit with the First Trust and Savings Bank at Pasadena was deposited to the joint credit of Ferdinand Fensky and Jeanette Fensky. There is only one signature card, viz., that of Jeanette Fensky, and from this fact the officer of the bank testifying as to this account stated that it indicated that Mrs. Fensky had made the initial deposit. [Tr. pp. 251-252.] Presumably, therefore, the money deposited by her therein August 1, 1903, was her own individual money. In any event, as a matter of law, the deposit was with the right of survivorship. It is not essential that the right of survivorship be expressly declared.

Crowley v. Savings Union Bank, 30 Cal. App. 144;

Kennedy v. McMurray, 169 Cal. 287.

In Crowley v. Savings Union Bank, *supra*, the rule was thus stated:

“The right of plaintiff to the balance for which she brought the action arises from the *well-under-*

stood incident of a joint tenancy—that, upon the death of one of two joint tenants, the survivor thereupon becomes the sole owner of the entirety, not by descent, but by survivorship, and in virtue of the original event creating the tenancy. The principles governing this case are so well settled that discussion of them would be supererogatory.”

30 Cal. App. 150.

In *Kennedy v. McMurray*, *supra*, the court said:

*“It was undoubtedly intended to and did create a joint interest or ownership in the deposit and this being the intention and as the right of survivorship applies to joint interests or ownership of personal property it must have been the intention of the deceased Kennedy in declaring the deposit to be joint property to have intended that the incident which follows joint ownership should apply to it and that upon his death his daughter should take the deposit as survivor. * * * It was unnecessary to accompany the creation of the joint ownership with a declaration respecting survivorship. That followed as a legal incident to the creation of the joint interest, a matter which Kennedy must be held to have known and intended to effect by the clear creation of the joint interest between himself and appellant in the deposit.”*

169 Cal. 293-4.

See, also:

McDougald v. Boyd, 172 Cal. 753;

Estate of Gurnsey, 177 Cal. 211.

In the case last cited the moneys on deposit were the property of the husband before his death and his

daughter was held to be entitled to the same by right of survivorship. In the case at bar, the moneys being deposited by Jeanette Fensky, as before stated, were presumably her own.

At the time of the death of Ferdinand Fensky Mrs. Fensky held a certificate of deposit of the Pasadena National Bank for \$800.00 in the name of "F. or Jeanette Fensky," and payable "to the order of either on the return of this certificate properly endorsed." This certificate of deposit is dated July 17, 1903, and undoubtedly, by reason of the joint tenancy created, became the property of Mrs. Fensky absolutely by right of survivorship, upon the death of her husband, under the decisions above cited.

(5) *The claim that Mr. Campbell misrepresented to appellants the collectibility of the notes and mortgages inventoried in Kansas, is wholly without merit.*

His statement in the letter to Mrs. Schutt is as follows:

"A number of the debtors want time in which to pay, and if Mrs. Fensky, the widow, was to take over these notes, she could accommodate these people and still collect all the money on the notes in exchange for them. If collection is forced, there will necessarily be much expense and loss pending collection." [Tr. pp. 393-4.] Mr. Kraus, whom appellants consulted and upon whom they relied, when shown the list of notes and mortgages, said:

"Some of the men whose names appear here were not very good pay, and especially after 1903. That

flood depreciated property along the low lands in and around Topeka, and it is so today. I sold my old home over there we figured being worth \$2500 for \$850. I would not have wanted to discount Mr. Foucht's note for \$800 at that time. * * * I would not have bought the notes for fifty cents on the dollar at the time of the flood in 1903." [Tr. p. 274.]

As late as December 15, 1904,—which was three or four months *after* Jeanette Fensky acquired the interests of appellants in the estate of Ferdinand Fensky,—Mr. Campbell wrote Mrs. Fensky:

"I do not care to press them very hard as long as there is a reasonable show for you to become the sole owner of the notes and mortgages." [Tr. p. 419.]

Mr. Campbell stated about six months after appellants had sold out their interests, that he had directed the debtors who were writing him to reduce interest, give more time, to throw off part of the debt, to write to Mrs. Fensky. [Tr. p. 428.]

It does not appear that Mr. Campbell ever represented that the notes and mortgages could not eventually be collected. His statements were that the risk of collection would fall upon the widow, if she purchased the interest of the other heirs, and if collections were forced for the purpose of distributing the estate in cash, that some loss would result thereby. The fact that most of the notes were *eventually* collected, shows the wisdom of Mr. Campbell's advice. The profit which Mrs. Fensky derived by reason of purchasing the interests of the heirs, is to be attributed to not forcing the collection and to giving the debtors more time.

necessitated by the floods of 1903 and 1904. Certainly this was the humane thing to do. If such an arrangement had not been made, it is quite probable as Mr. Campbell stated, if distribution was to be made in cash, that it would have involved some delay and loss. Mr. Campbell told Mr. Krauss *before* Mrs. Fensky purchased the interests of appellants, that if he would secure a power of attorney from the sister in Germany, that he would make distribution at once [Tr.p. 383], although under the Kansas laws, in view of the fact that creditors have three years within which to file claims, distribution could not be forced without putting up a bond.

(6) *Appellants received a fair and reasonable compensation for their interest in the estate of Ferdinand Fensky from Mrs. Fensky and were in no way imposed upon.*

After the payment of all debts and expenses of administration, including family allowance and the homestead awarded by the court to Mrs. Fensky in California, and including the fees of Mr. Campbell as administrator, a balance of \$21,209.00 was left for distribution, of which amount, if there had been no assignments by the collateral heirs, the widow would have been entitled to one-half, to-wit: \$10,604.50, and each of the collateral heirs to a *one-sixteenth*. Considering that at the time the assignments were made by appellants to Mrs. Fensky (July, 1904) very few of the notes and mortgages had been collected [Tr. pp. 461-3] and that it was doubtful how much of them would be

collected in view of the fact that creditors had three years after the death of Ferdinand Fensky in which to present the claims,—the payment of \$1000.00 to each of them, except Fred Fensky, the last one to settle, who was paid \$1100.00, was entirely fair and reasonable. Appellants were getting their money *at once* and the widow took the risk of collecting the notes and mortgages and the risk of creditors' claims being filed within the next two years thereafter. The fact that nearly all of these notes and mortgages, when the debtors who suffered severe losses from the flood in 1903 were humanely given more time, *eventually* paid nearly all these notes and mortgages, is immaterial. Mr. Campbell stated to appellants that this would be the case. [Tr. pp. 274, 393.] Mr. Krauss, the husband of one of the heirs who had lived in Topeka many years, knew that many of the makers of these notes and mortgages due the estate on the list shown him “were not very good pay” and “especially after” the flood of 1903, and stated that he would not have bought the notes “for fifty cents on the dollar at the time of the flood in 1903. The land contracts were mentioned to him and he was informed that they constituted real estate and went direct to the widow. [Tr. p. 269.] He also consulted an attorney. [Tr. p. 356.] After the proposition of settlement was submitted to him, he accepted the proposition of Mrs. Fensky, and neither he nor his wife are making any complaint. [Tr. p. 277.]

Mrs. Wendt, the sister living in Germany, also employed an attorney by the name of Slater [Tr. p. 423]

who came to the conclusion that the offer of the widow "was a square thing." [Tr. p. 424.] She is making no complaint.

Fred Fensky, who lived in Leavenworth, Kansas, one of the heirs, came to Topeka and remained a couple of days, and who knew of the land contracts, looked over the property in Fensky's addition, and made a thorough investigation. He also employed an attorney to advise him relating to the land contracts [Tr. pp. 275, 277], and after consulting his attorney, Mr. Jackson, as to whether or not the land contracts were personalty in which he was entitled to participate, was satisfied that he had no interest in the land contracts and was satisfied to accept \$1100.00 for his interest. [Tr. p. 275.] He was the only heir who had not sold out and in order to close the matter he was paid \$100.00 more than the other heirs, which seemed to be perfectly satisfactory to him, and he is making no complaint now. Neither are any of the other heirs making any complaint, nor did the father of the intervenor during his lifetime make any complaint. Mrs. Krauss, the only one of them who testified in this case, said: "I never, myself, made any claim that I was not treated right." [Tr. p. 277.]

The consideration for the assignment and quit-claims from appellants to Jeanette Fensky of their interest in the estate of Ferdinand Fensky, was furnished by Jeanette Fensky.

She, as the widow of deceased, was admittedly entitled to all of the Kansas realty and one-half of all

the personalty. The moneys used in procuring the assignments and quit-claim deeds were advanced by Campbell to Mrs. Fensky, at her request [Tr.pp. 289, 409, 411] on account of her recognized and indisputable share of the estate of Ferdinand Fensky. [Tr. pp. 407, 408.] Campbell in each instance secured the receipt of Mrs. Fensky for the moneys so advanced. [Tr. pp. 408, 411, 413, 415, 427, 439, 457.]

In view of the fact that Ferdinand Fensky left no debts in Kansas [Tr. p. 302] and that Mrs. Fensky's interests would far exceed the amount advanced by Campbell to her and of her financial responsibility and promise to return the amount advanced if ever required, he was willing to assume the personal risk of advancing this money to Mrs. Fensky. [Tr. p. 407.] It therefore follows conclusively that such money did not belong, and was not regarded as money belonging, to the estate of Ferdinand Fensky, but was money, and was regarded as money, then belonging and properly so to Mrs. Fensky.

Furthermore, in view of the fact that Mrs. Fensky bought out the interest of all the heirs, it makes no difference to appellants from where she got the money, if she paid them. The circumstance that the written request to Mr. Campbell, as administrator, to advance this money is undated, is explained in Mr. Campbell's letter to Mrs. Fensky. [Tr. p. 411.]

In this connection, Judge Bledsoe, in his opinion to the court below, said:

“That they were paid for their assignments out of money in the hands of the administrator is of

no moment. They conveyed and intended to convey all their interest in the estate for the consideration received. Whether the identical money passed came from Mrs. Fensky personally or from the administrator's bank account is immaterial. In view of their voluntary assignments, they received all that they were entitled to." [Tr. p. 198.]

The Supreme Court of Kansas took the same view. (*Pickens v. Campbell*, 179 Pac. 343.)

NOTE: We wish to note, in passing, that the statement in appellants' brief (p. 110) that Campbell retained for his services the \$3000 advanced to the widow (in addition to the \$8016.10 advanced to the widow as aforesaid) is conclusively refuted by the record. [Tr. pp. 428, 439, 481.]

THE JUDGMENT IN *PICKENS V. CAMPBELL*, RENDERED BY THE KANSAS COURT, IS RES JUDICATA OF THE ISSUES THERE DETERMINED, AND HEREIN AGAIN ATTEMPTED TO BE LITIGATED, AND IS BINDING ON APPELLANTS IN THIS CASE.

The pleadings and the entire proceedings of the court in the case of *Pickens v. Campbell*, 179 Pac. 343, were introduced in evidence and appear at pages 670 to 731 of the transcript. An examination of this record will show that *all of the issues of fraud on the part of Mr. Campbell and of the nature and effect of the Kansas realty contracts, which are again raised in this case were also raised in that case, and were decided adversely to appellants herein.* It conclusively

adjudicated (1) that the Kansas land covered by the land contracts were not personalty but realty descending directly to Mrs. Fensky, the widow, to be inventoried as real property, (2) that no property which should have been inventoried by Campbell was omitted from his inventory fraudulently, or otherwise; and (3) that Campbell was guilty of no fraud or wrongdoing of any kind upon appellants.

The general rule is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, can not be disputed in a subsequent suit between the same parties or their privies, and this even if the second suit is for a different cause of action; for the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment of the first suit remains unmodified.

Southern Pacific R. R. Co. v. United States,
168 U. S. 1, at pp. 46 to 60;

Deposit Bank v. Frankfort, 191 U. S. 499, 512;

Fayerweather v. Ritch, 195 U. S. 276, 299;

Baker v. Eilers Music Co., 175 Cal. 657, 659;

Lake v. Bonyng, 161 Cal. 120, 127-131;

Curtis v. Upton, 175 Cal. 322, 331;

Koehler v. Holt Mfg. Co., 146 Cal. 335, 337;

Green v. Thornton, 130 Cal. 482, 485;

Garwood v. Garwood, 29 Cal. 515, 521;

Jackson v. Lodge, 36 Cal. 28, 37.

"Privity means a mutual or successive relationship to the same rights of property, and within the rules relating to the conclusiveness of judgments, all persons are privies to a judgment whose succession to the rights of property thereby adjudicated or affected were derived through or under one or other of the parties to the action, and accrued subsequent to the commencement of that suit."

23 Cyc. 1253.

The title to the *personal property* owned by Ferdinand Fensky and administered on in Kansas, was vested in Mr. Campbell, as administrator, and Jeanette Fensky, the distributee of such personalty, took title from Campbell, and not from her deceased husband. The rule in regard to *real property* is different, such property going direct to the heirs, and not to or through the administrator.

In 2 Van Fleet on Prior Adjudication, Sec. 465, it is said:

"So far as the personal estate of a decedent is concerned, it does not technically descend to the heirs but passes to an administrator or executor through whom they take as distributees. Hence, in regard to that part of the estate, the privity between them and him is complete."

And in section 466 the author says:

"The real estate of a decedent descends directly to the heirs, and the interest of the administrator

is in the nature of a naked conditional power, namely: He has the right to sell, if necessary, to pay debts. Hence, the privity between him and the heirs in respect to it is slight or none at all."

Certainly, therefore, as the successor in interest, *as to personalty*, of the administrator Campbell, who was the defendant in the action brought by appellants in *Pickens v. Campbell* (179 Pac. 343), Jeanette Fensky must be considered as being in privity with Campbell the defendant in that action, and would be therefore entitled to the benefit of that adjudication.

2 *Van Fleet on Prior Adjudications*, section 465;

Pond v. Pond's Estate (Vt.), 65 Atl. 97;

Moody v. Peyton, 135 Mo. 482, 58 Am. St. Rep. 604, 606;

Darrow v. Clakins, 39 N. Y. Supp. 527;

Her successors in interest, who are appellees herein, are therefore also in privity with Campbell.

In *Darrow v. Calkins*, 39 N. Y. Supp. 527, the representative of a deceased partner sought a settlement of the affairs of the partnership. It was held that in such a proceeding the court may determine whether or not there is any partnership realty which could descend to the heirs, and that its decision thereon is conclusive on the heirs though they were not parties to the proceeding. The court regarded the partnership realty as subject to the attributes of personal

property until the final settlement of the partnership affairs, and said:

“Until, therefore, there was this final settlement and adjustment of the accounts, the heirs of Darrow were not vested with the legal title to this real estate. What they were entitled to was an accounting of the partnership affairs, and this is what they had through the representative of Darrow’s estate, who was competent to maintain an action for that purpose. Upon this accounting the court had jurisdiction to adjust the affairs of the partnership, and to determine the question whether or not there existed any real property which would descend to the heir. It did not follow, because there was, in fact, real property which equitably belonged to the partnership, that upon an adjustment of the equities between the members of the firm it would necessarily so remain, and be set apart as property which would descend to the heir. But it was competent, on such accounting, for the court to determine, in adjusting the equities between the parties, that, when adjusted, there remained no real property for distribution or descent, but that, upon adjustment, there remained a certain sum of money due to his estate. This, in effect, is what the court determined, and such is the effect of the decree. Having power to adjudicate upon the subject-matter in an action where the estate of Darrow was represented as a party, and possessing power to determine that there existed no real property of the partnership to which the estate of Darrow was entitled, and having so determined, we see no reason why such adjudication is not conclusive of

that question and constitutes a bar binding upon his estate and his heirs.”

The views above expressed in *Van Fleet on Prior Adjudication* are referred to with approval in *Pond v. Estate of Pond*, 65 Atl. 97 (Vt.), and in *Moody v. Peyton*, 135 Mo. 482, 58 Am. St. Rep. 604, 606.

In *Southern Pacific R. R. Co. v. United States*, 168 U. S. 1, it is held, to quote the syllabus, that

“A decision as to the sufficiency of maps to make a definite location or designation of the route of a railroad, on which the title to lands included in a railroad grant depends, is conclusive in another action then pending between the same parties respecting other lands within the same grant.”

and that

“a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies even if that suit is for a different cause of action.” (See pp. 48 *et seq.*)

Complainants are caught on the horns of a dilemma: In order to avoid the rule above set forth that *as regards personalty* the heirs are considered as in privity with the administrator, complainants here are required to take the position that the Kansas realty covered by the contracts in question remained *realty* unaffected by the sales contracts, and under the laws of Kansas properly descended to the widow as realty, in which

case complainants' case fails; if, on the other hand, as complainants claim, an equitable conversion of said realty into *personal property* was worked by said contracts, then, as shown by the foregoing cases, the widow, Jeanette Fensky, and the defendants as the successors in interest of Jeanette Fensky, are in privity as to it with the administrator Campbell, and complainants are therefore barred by the judgment of the Kansas court in *Pickens v. Campbell*.

Neither of the two solitary authorities cited by appellants in their brief (page 147) in support of their claim that there is no privity between the defendant Campbell in the case of *Pickens v. Campbell* and appellees, are in point. The extract from the note in 8 L. R. A., N. S., was used in connection with a situation entirely different from that involved in the case at bar, as clearly appears from the note which is entitled:

“Is an administrator or the Executor in such privity with a legatee, distributee or creditor *that he may assert a personal defense of the latter to a claim against the Estate*” (in an action against him as such administrator).

In *Sholty v. McIntyre* (135 Ill. 171, 29 N. E. 43), cited by appellants, a judgment was recovered against an administrator for a trespass by his intestate. A brother, who was an heir of the intestate (without the knowledge or consent of the administrator) took an appeal. The court very properly held that an appeal could only be taken by the administrator, and that

the appeal taken by the brother of the deceased was rightly dismissed upon the motion of the administrator. This was not a case involving the right of the successors in interest of the administrator to rely upon a prior adjudication in a case to which the administrator was a party.

Not only does this case come within the general rule that, in order to make a former judgment a bar to a subsequent action, it must have been rendered in an action between the same parties or between those *in privity* with them. But there is a well settled exception to this general statement of the rule:

WHERE AN AGENT IN A TRANSACTION IS SUED AFTER THE TERMINATION OF HIS AGENCY, AND UPON A TRIAL OF THE MERITS THE ISSUE IS DETERMINED AGAINST THE PLAINTIFF, THE PRINCIPAL THOUGH NOT A PARTY TO THE SUIT, CAN AVAIL HIMSELF OF THE JUDGMENT AS A BAR WHEN HE IS SUED BY THE SAME PLAINTIFF FOR THE SAME ALLEGED MISCONDUCT OR FRAUD OF THE AGENT.

We cite the following authorities:

Portland Gold Mining Co. v. Stratton's Independence Limited, 158 Fed. 63 (C. C. A.);

Emma Silver Mining Co. v. Emma Silver Mining Co., 7 Fed. 401, 407;

New Orleans & Northeastern R. R. Co. v. Jopes, 142 U. S. 18, 24;

Featherston v. Newburgh & C. Turnpike Road, 71 Hun. 109, 24 N. Y. Supp. 603;

Ransom v. City of Pierre, 101 Fed. 665, 41 C. C. A. 585;

Note at 54 L. R. A., pp. 649-656, and case there cited.

In the case at bar *Campbell was the immediate actor in securing the assignments and quitclaim deeds from appellants. He made whatever representations were made. If in so doing he committed no fraud, certainly his principal, Jeanette Fensky, could have committed no fraud by reason of his acts*, from which it conclusively follows that the appellees herein, as the successors in interest of Jeanette Fensky, cannot be charged with any such fraud.

The author of the note in 54 L. R. A., *supra*, summarizes the cases cited by him as follows:

“While servants and agents are not usually regarded as falling within the legal definition of privies, a previous determination in favor of a servant or agent is deemed conclusive upon a subsequent action against the master or principal as having been between the same parties, the term ‘parties’ to an action within the meaning of the law of *res adjudicata* including not only the persons named, but also persons whose rights have been legally represented by them. Some of the Missouri cases, however, seem to have adopted a somewhat more strict construction of the term ‘parties.’

With reference to identity of the issues the matter in issue is that upon which the plaintiff

proceeds by his action, and which the defendant controverts by his pleadings, and not the facts offered in evidence to establish the issue, though controverted. *And the question whether or not the issues in the two suits are the same depends upon whether both might be determined upon the same testimony presented by the same parties or those by whom they were legally represented.* A mere difference in the method of statement, or in the subject-matter, or the mere fact that other issues were involved, is of no effect."

In *Portland Gold Mining Co. v. Stratton's Independence*, *supra*, the court quotes the following extract from the second case above cited:

"Well in point is *Emma Silver Mining Co., Limited, v. Emma Silver Mining Co. of New York (C. C.)*, 7 Fed. 401, 407, which was a suit in equity for the rescission of the sale of a mine and other property because of deceit charged to have been practiced by the defendant, through certain of its agents, in effecting the sale. The defendant interposed a plea to the effect that the complainant had theretofore instituted an action at law against the defendant's agents to recover damages for the deceit, in which the matter of that charge had been adjudicated in their favor; and, in response to the complainant's contention that the defendant could not avail itself of that judgment as a bar, or as a conclusive determination of the facts, because the defendant was not a party to it, it was said by Judge Choate:

'The weight of authority, however, is that, where an agent in a transaction is sued after the

termination of his agency, and, upon a trial of the merits, the issue is determined against the plaintiff, the principal, though not a party to the suit, can avail himself of the judgment as a bar, when he is sued by the same plaintiff on the same cause of action. While the principal, if he had no notice of the former suit, and no opportunity to defend it, may not be concluded by a judgment against his former agent, or made responsible by the agent's bad pleading or blunders in the trial of the cause, because so to conclude him would be to deprive him of his property without due process of law, yet, as regards the plaintiff who has before sued the agent and been defeated, there is no reason why he should not be concluded upon that principle of public policy which gives every man one opportunity to prove his case, and limits every man to one such opportunity. He has had his day in court, and it is immaterial whether he has chosen to test his right as against the principal or the agent in the transaction, provided the issue to be tried was identical as against both.'"

A leading case in the United States on this subject is *Emery v. Fowler*, 39 Me. 326, which was an action in trespass *quare clausum* against one who had acted under the direction of his father in a prior action by the plaintiff against the father for the same act. The father, who admitted that the son acted under his direction, had been acquitted, and it was held that the son was entitled to the benefit of that adjudication. We quote from the opinion:

"To permit a person to commence an action against the principal, and to prove the acts al-

leged to be trespasses, to have been committed by his servant acting by his order, and to fail upon the merits to recover, and subsequently to commence an action against that servant and to prove and rely upon the same acts as a trespass, is to allow him to have two trials for the same cause of action, to be proved by the same testimony. *In such cases the technical rule that a judgment can only be admitted between the parties to the record or their privies expands so far as to admit it, when the same question has been decided and judgment rendered between parties responsible for the acts of others."*

In the case at bar the situation is just the reverse, but the principle is the same. The agent, Campbell, was adjudged to have committed no fraud. His principal, Mrs. Fensky, for whom he was acting *as agent* in securing the assignments in question, and appellees, as her successors in interest, are entitled to the benefit of that adjudication.

From the foregoing citation of authorities it is manifest that the case of *Pickens v. Campbell*, 179 Pac. 343, is a conclusive determination of the same facts and issues which complainants are here again attempting to litigate, namely, that the Kansas contracts did not work an equitable conversion, and that no fraud was committed upon complainants in securing the assignments and quitclaim deeds of their interest as heirs of Ferdinand Fensky.

Even If Appellants Had Proved Sufficient Fraud to Set Aside the Quitclaims and Releases to the Widow Jeanette Fensky, and the Decree of Distribution in the Estate of Ferdinand Fensky, it Would Have Been of No Avail to Them, for the Interest of Not One of the Appellants in the Estate of Ferdinand Fensky Can Be Definitely or at All Traced to Any Specific Property in the Hands of Appellees.

Of course, no fraud, either actual or constructive, has been proven by appellants, as is hereinbefore pointed out; but, even if such fraud had been proven, it would not avail appellants, for the reason that none of them can trace the *alleged balance* of his or her particular undivided one-sixteenth interest in the estate of Ferdinand Fensky, which was never segregated, to any specific property in the hands of defendants, with any definiteness or certainty, or at all.

The right of a *cestui que* trust to reclaim trust funds, or property into which it is alleged the same has been converted—particularly as here when the property is in the hands of third parties—is founded on the *right of property*, and not on the ground of compensation for its loss. Accordingly, the specific money of the alleged *cestui que* trust must be clearly traced, and identified in specie in the property claimed. When the claimant is unable to do this, the trust fails, and *his claim becomes one only for compensation for the loss of the property against the alleged trustee, or the trustee's estate.*

So in the case at bar: Since no one of the complainants can trace her alleged particular moneys into any particular property, they at most had but a *claim against the estate of Jeanette Fensky* for compensation for the alleged loss. This claim should have been presented to the administrator of her estate within the time limited by law for the presentation of claims of creditors against the estate of Jeanette Fensky.

The rule is well stated in *Ferris v. Van Vechten*, 73 N. Y. 121, as follows:

“The money paid by the trustee for lands or other property, or for choses in action sought to be subjected to the original trust, must be identified as trust moneys; and this is clearly recognized in all the cases, and in very many of them this has been the difficult question of fact upon which they have hinged, and the principle to be deduced from them is, that when the trust fund has consisted of money, and been mingled with other moneys of the trustee in one mass, undivided and indistinguishable, and the trustee has made investments generally from moneys in his possession, the *cestui que* trust cannot claim a specific lien upon the property or funds constituting the investments. (Hill on Trustees, m. p. 522.)

* * * It is the difficulty of tracing the trust money, which has no ear-mark, that prevents the application of the rule. (See, also, *Hutchinson v. Reed*, Hoff. Ch. R. 316, and cases by Asst. V. Ch., 2 Kent’s Com., 623, 624; *Trecothick v. Austin*, 4 Mason 29.)

There can be no presumption as against the defendants whose property is sought to be affected

by the trust, which attached to the moneys realized by Van Vechten from the sale of lands under the power. So far as appears they are innocent of all wrong-doing, and have not colluded or combined with the executors to violate the trust, and it is not found that they assented to or had any knowledge of any misappropriation of the fund, and if made trustees in virtue of their ownership of the lands they are made so, not by reason of any act of theirs, but as the legal result of the fact that trust moneys have been misapplied by a trustee of the fund to relieve of a burden their lands, held in trust for another purpose by the same trustee."

73 N. Y. 121-122.

The weight of authority is to the effect that in order that a trust fund or trust property which has been misapplied or wrongfully dissipated may be followed in equity into lands claimed to have been purchased therewith, or the proceeds thereof, and the trust enforced against the persons who have acquired the lands by gift or with notice, it is essential that it be *clearly traced and identified in the particular land claimed*.

Byrne v. McGrath, 130 Cal. 316;

Spokane Co. v. Spokane First Nat. Bank, 68 Fed. 979, 16 C. C. A. 81;

Lowe v. Jones, 192 Mass. 94, 78 N. E. 402, 116 Am. St. Rep. 225, 6 L. R. A. (N. S.) 487;

Mercantile Trust Co. v. St. Louis & S. F. Ry. Co., 99 Fed. 485;

Commercial Bank v. Armstrong, 148 U. S. 50;
Multnomah Co. v. Oregon Nat. Bank, 61 Fed.
912;

Illinois Trust etc. Bank v. First Nat. Bank of
Buffalo, 15 Fed. 858.

In *Lowe v. Jones*, *supra*, it was held that a trust cannot be established against the proceeds of trust property wrongfully disposed of by the trustee, which are in the hands of the administrator or his insolvent estate, unless such proceeds can be identified and traced into some specific fund or property. We quote the following extract from *Crawford Co. Commrs. v. Strawn* (C. C. A., 6th Cir.), 15 L. R. A. (N. S.) 1106:

"But, aside from this view of the evidence, the claim to a general charge upon any and all property acquired by the bank, through the use of the general funds of the bank with which this trust fund had been blended, is not supported by the weight of authority; nor do the cases decided by this court go so far. That the misuse of this trust fund has gone to swell, in one form or another, the general assets of the bank, is not enough to charge the whole with a lien, will not be seriously contested. The cases which deny such a contention are numerous. To impress a trust upon the property of a tortfeasor who has used the trust fund in his private affairs, it must be traced in its original shape or substituted form. *City Bank v. Blackmore*, 21 C. C. A. 514, 43 U. S. App. 617, 75 Fed. 771; *Re Taft*, 66 C. C. A. 385, 133 Fed. 511, 514; *Erie R. Co. v. Dial*, 72 C. C. A. 183, 140 Fed. 689, 691; *Smith v.*

Mottley, 9 L. R. A. (N. S.) 876, 80 C. C. A. 154, 150 Fed. 266; and Smith v. Au Gres Twp., 80 C. C. A. 145, 150 Fed. 257,—are cases decided by this court, which recognize that the mere misapplication of a trust fund does not create a general lien upon the tortfeasor's estate. In other courts the question has been presented more squarely for a decision, and supports the rule that an identification of the fund itself, or a tracing into some specific property, is essential to reach the property of a wrong-doer, either in the hands of an assignee, trustee, receiver, or under a lien fastened by a creditor. *Peters v. Bain*, 133 U. S. 670, 693, 33 L. ed. 696, 704, 10 Sup. Ct. Rep. 354; [citing other cases]; *Spokane County v. Clark* (C. C.), 61 Fed. 538, *affirmed by the circuit court of appeals for the ninth circuit*, 16 C. C. A. 81, 29 U. S. App. 707, 68 Fed. 979, 991, 992; * * *.

Peters v. Bain, 133 U. S. 671, 678, 693, 33 L. Ed. 696, 699, 704, 10 Sup. Ct. Rep. 354, is a very close authority upon the facts of this case. There the moneys of a national bank had been obtained and used in breach of trust by a firm of private bankers. Both failed,—the firm after a general assignment. The receiver of the national bank sought to impress with a trust the entire property of the firm in the hands of its assignee. It was shown that the bank's money had been used exclusively in the purchase of certain property. It was sought, also, to impress a lien upon other property which had been 'paid for by the firm out of the general mass of moneys in their possession, and which may or may not have been made up in part of what had been wrongfully

taken from the bank.' Waite, Ch. J., heard the case on circuit, and, as to this class of property, said: 'There the purchases were made with moneys that cannot be identified as belonging to the bank. The payments were all, so far as now appears, from the general fund then in the possession and under the control of the firm. Some of the money of the bank may have gone into this fund, but it was not distinguishable from the rest. The mixture of the money of the bank with the money of the firm did not make the bank the owner of the whole. All the bank could, in any event, claim would be the right to draw out of the general mass of money, so long as it remained money, an amount equal to that which had been wrongfully taken from its own possession and put there. *Purchases made and paid for out of the general mass cannot be claimed by the bank, unless it is shown that its own moneys then in the fund were appropriated for that purpose.* Nothing of the kind has been attempted here, and it has not even been shown that, when the property in this class was purchased, the firm had in its possession any of the moneys of the bank which could be reclaimed *in specie*. To give a *cestui que trust* the benefit of purchases by his trustees, it must be satisfactorily shown that they were actually made with the trust funds.'"

In *Spokane Co. v. First Nat. Bank*, 68 Fed. 979, decided by the circuit court of appeals for this circuit, the rule is laid down as follows:

"Both the settled principles of equity and the weight of authority sustain the view that the

plaintiff's right to establish his trust and recover his fund must depend upon his ability to prove that his property is in its original or a substituted form in the hands of the defendant. · Little v. Chadwick, 151 Mass. 109, 23 N. E. 1005; Cavin v. Gleason, 105 N. Y. 256, 11 N. E. 504; Association v. Austin (Ala.), 13 South. 908; Shields v. Thomas (Miss.), 14 South. 85; Silk Co. v. Flanders (Wis.), 58 N. W. 383; Slater v. Oriental Mills (R. I.); 27 Atl. 443; Bank v. Armstrong, 39 Fed. 684; Multnomah Co. v. Bank, 61 Fed. 912; Massey v. Fisher, 62 Fed. 958."

68 Fed. 982.

In the case at bar all of the Kansas realty and one-half of the California realty and one-half of the Kansas and California personalty went to Mrs. Fensky upon the death of Ferdinand Fensky. It was shown that Mrs. Fensky had some money of her own at the time of their marriage [Tr. p. 624], and that she subsequently received a bequest from an old sweetheart. [Tr. p. 624.] Complainants were each entitled, at most, to but a very small balance of an undivided one-sixteenth interest in the personal estate and the California realty of Ferdinand Fensky. *This interest was never divided or segregated into a distinct and separate fund.* The principal fraud claimed was relative to the sales contracts of the Kansas realty in Fensky's Addition, but none of the proceeds of these sales contracts has been traced with that degree of certainty required by the foregoing decisions, *or at all, into the California realty deeded to the defendants.* The only

evidence tending in the slightest degree to connect the two is that during the administration of her husband's estate she received, from time to time, and over a considerable period of time, in the years 1903 and 1904, large remittances from the Kansas administrator, and that on September 18, 1907, she was seized of a number of pieces of land in California. Even if we assumed for the purpose of argument only that the sales contracts of the lots in Fensky's Addition constituted personalty, as claimed by complainants, still more than one-half of the moneys received from all sources by Mrs. Fensky from Kansas came to her in her own right as the widow of the deceased. So she had considerable funds of her own free and clear of any claims of her husband's other heirs. When the land deeded to defendants on September 18, 1907, was acquired (except that deeded to Mrs. Katzung) is left wholly to the imagination; and whether or not it was acquired with money in which appellants could possibly trace the alleged balance of their undivided one-sixteenth interest, or with the proceeds of the Kansas realty, which descended direct to the widow (a large part of which was not covered by any contract to sell), or with her undisputed portion ($\frac{1}{2}$) of the California realty and ($\frac{1}{2}$) of *all* the personal property both in Kansas and California, or with other funds of Mrs. Fensky, is entirely a matter of conjecture, and not of proof. As to the land deeded to Mrs. Katzung, this land was distributed to Mrs. Fensky from the estate of Ferdinand Fensky and consequently could not pos-

sibly have been purchased with the proceeds of any Kansas personal property to which appellants could in any event have any possible interest.

As stated in *Ferris v. Van Vechten, supra*:

"It does not suffice to show the possession of the trust funds by the trustee, and the purchase by him of property—that is, payment for property generally by the trustee does not authorize the presumption that the purchase was made with trust funds." (P. 120.)

In that case the proof of tracing was very similar to the proof in the case at bar. It was shown that large sales of real estate of the testator had been made by the executors on account of which they had realized large sums of money. It also appeared that large amounts of money arising therefrom were applied in keeping the homestead farm (upon which a trust was sought to be charged) in repair, and in paying interest and taxes thereon. But, as stated by the court:

*"There was no proof that one dollar of the moneys received for lands, and which constituted the trust fund, was paid or applied to any of the purposes mentioned, * * *."*

Appellants' and Intervenor's Supposed Cause of Action Growing Out of the Alleged Fraud of Mr. Campbell and Jeanette Fensky Is Barred by the Statute of Limitations.

The statutory period within which an action may be brought for relief on the ground of fraud is three years and "the cause of action in such case (is) not

to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

Code of Civil Procedure (Cal.), Sec. 338, Subdiv. 4.

The burden of proof is upon appellants not only to allege but to prove that they had no knowledge of the alleged fraud until within three years before the commencement of the action.

Lady Washington Con. Co. v. Wood, 113 Cal. 482.

The provision of the statute regarding discovery is derived from the principles of equity jurisprudence. The rule in equity is that *knowledge of facts which would put a reasonably prudent man on inquiry is equivalent to discovery*, and our statute and similar statutes have been construed in the light of this rule.

Lady Washington Consolidated Co. v. Wood, 113 Cal. 482;

Rugan v. Sabin, 53 Fed. 415, 419 (C. C. A., 8th Cir.);

Redd v. Brun, 157 Fed. 190, 192 (C. C. A.).

The bill of complaint in this action was filed almost *eleven years* after the commission of the alleged initial fraud upon which appellants' claim for relief is attempted to be grounded, *ten years* after they made the assignments of all their interest in the estate of Ferdinand Fensky to his widow, which they now seek to

have this court set aside, and more than *six years* after the death of said widow. The statutory period of three years had run several times over. *Prima facie* appellants' alleged cause of action is barred. The only ground upon which appellants can ask the court to investigate their belated claims is that they excusably failed to discover the alleged frauds complained of or of any facts which would put them upon inquiry until within three years before the commencement of their action.

When this case was before this court before, strictly upon the bill of complaint (242 Fed. 363), this court felt that it was bound by the allegation of appellants in their bill of complaint that they did not discover the alleged fraud or have any notice or suspicion of the amount or value of the estate of their deceased brother until July, 1912. We quote the following extract from the previous decision of this court:

"The bill of complaint in this case was not filed until July 8, 1914. With the releases and quitclaims executed by the complainants in 1904, standing against their cause of action for alleged fraudulent acts in dealing with the estate of Ferdinand Fensky, *the statute of limitations and the doctrine of laches would be a bar to this suit, but for the allegation in the bill that not until late in the summer of 1912 did the complainants, or either of them, have any notice or suspicion of the truth respecting the amount, extent, and value of the estate of their deceased brother, or of the frauds and fraudulent conduct of M. T. Camp-*

bell, Jeanette Fensky, and J. H. Merriam in dealing with the said estate in the matters charged in the bill of complaint. This discovery is alleged to have been made in July, 1912, * * *.”

242 Fed. 363, at 367.

This court also held that it having been alleged in the complaint that appellants' ignorance of the fraud had been produced by affirmative acts of Mr. Campbell and Jeanette Fensky in concealing the facts from them, that it was not necessary for them to allege in what way the discovery was made so that the court might clearly see whether by ordinary diligence the recovery might not have been made before, relying upon the rule laid down in *Bailey v. Glover*, 88 U. S. (21 Wall.) 342, 347.

Since at the trial the allegations of the complaint as to the time of discovery of the alleged fraud and the alleged concealment of such fraud were not only not proven, but are contrary to the weight of the evidence, it is manifest that appellants' claim for relief on the ground of fraud is many times over barred by the statute of limitations.

It appears positively and conclusively that not only did appellants have actual knowledge of the existence of the land contracts covering property in Fensky's Addition, at the time of their voluntary assignments of their interests in the estate of Ferdinand Fensky to his widow, but also they were expressly advised by Mr. Campbell of the existence of such contracts,

at the same time being informed of Mr. Campbell's positive belief that they were real property descending direct to the widow, in which they, as heirs, were not interested.

As before stated, Louisa Pickens resided in Topeka, Kansas, since 1876 [Tr. p. 266], and visited her brother, Fred Fensky, from time to time [Tr. pp. 276, 282], who lived in Fensky's Addition, whose only business was planning and building houses, principally in Fensky's Addition [Tr. p. 275], and selling them on contract. [Tr. pp. 506, 361, 277.]

Mrs. Kraus, a sister of appellants, and her husband, Oscar Kraus, also had lived in Topeka for a long time. He had been a business man there since 1869 [Tr. p. 277] and were in close touch with Ferdinand Fensky while he lived in Topeka. [Tr. pp. 274, 277-8.] It also appears that Mrs. Schutt not only corresponded with her sister, Mrs. Kraus, who lived in Topeka, Kansas, at about the time she executed her assignment to Jeanette Fensky, the widow, but it also appears that Mrs. Schutt was in Topeka during the time that Fensky's Addition was being laid out, and when it was being built up. [Tr. p. 278.] Both Mrs. Schutt and Mrs. Pickens relied upon the information and advice given them by their brother-in-law, Mr. Kraus. [Tr. pp. 273, 279.] Mrs. Krauss knew of the Fensky Addition, that her brother was building houses on this addition and selling them, knew the names of some of the purchasers, that there was no one else building houses there for the purpose of sale. [Tr. p. 277.]

Mrs. Pickens and Mrs. Schutt had the same opportunities to know these facts, and surely knew them. It is absurd for these two sisters, who were in Topeka when this addition was being built up by their brother, Ferdinand Fensky, and who visited him at his home in Fensky's Addition, to say that they did not know his business was planning and building and selling the houses in that addition.

In addition to this, the following extract from the testimony of Mr. Kraus, who was the advisor of appellants, shows that Mr. Campbell informed him of the existence of these land contracts:

“Q. Did Campbell ever mention to you anything about the contracts of sale of real estate in Fensky's addition and elsewhere?

A. He said to me those transactions in the so-called Fensky addition were all real estate and that we had nothing to do with that.

Q. That the heirs had nothing to do with that?

A. Yes, the heirs here in Kansas.

Q. Did Mr. Campbell in any conversation with you say anything about what interest the brothers and sisters of Ferdinand Fensky had in the contracts for sale of lots in the Fensky addition?

A. He told me we had nothing to do with those affairs in the addition.” [Tr. p. 269.]

In addition to this, the sale of lots in the Fensky Addition by Ferdinand Fensky “was advertised in a public way in the newspapers and otherwise,” and there was a big sign over the north end of the bridge, indicating that the lots in the Fensky Addition were for

sale. That was his home place and was on a public thoroughfare. [Tr. p. 274.]

In addition to this, Fred Fensky, a brother of appellants, in July, 1904, and *a few days prior* to the time that appellants assigned their interests in the estate of Ferdinand Fensky to Jeanette Fensky, the widow (compare letter of Campbell dated July 24, 1904, referring to Fred Fensky [Tr. p. 399] with assignments by appellants [Tr. pp. 583-4] dated July 29, 1904, and August 3, 1904) came over from Leavenworth, Kansas, his home, to Topeka, and made an investigation of the estate of Ferdinand Fensky, got a written statement from Campbell as to the assets of the estate as inventoried [Tr. p. 275] and "went to Fensky's Addition and looked over the property". He called upon Mr. Campbell and quizzed him about the land in Fensky's Addition and the number of houses built, etc., and "trenched very closely on the idea" that the land contracts were personalty. [Tr. p. 399.]

Fred Fensky was the first one who asked Mr. Campbell particularly about the addition property. [Tr. p. 399.] He was informed by Mr. Campbell that most of the addition people had deeds to their property, whereupon Fred Fensky "wanted to know why the notes and mortgages taken from them were not personal property of the estate". Mr. Campbell "explained to him" that they were made to Jeanette Fensky and were her individual property, and that the real estate belonged to Mrs. Fensky "individually and the estate had nothing to do with it." [Tr. p. 399.]

At this point we wish to point out that the mortgages referred to given to Mrs. Fensky individually by the holders of the land contracts in Fensky's addition were made a matter of public record, and although the deeds given to these contract purchasers at the time were dated prior to the death of Ferdinand Fensky, the deeds and the mortgages back were publicly recorded *in each instance on the same date*, and the public record of the mortgages showed that they were not only dated, but acknowledged and recorded *subsequent* to the death of Ferdinany Fensky.

(Compare list of recorded deeds of Ferdinand Fensky and wife to others on pp. 322-4 of the transcript with recorded list of mortgages to Jeanette Fensky, as set out on pp. 325-6 of the transcript.)

These public records which were open to inspection by appellants manifestly showed upon their face that the mortgages referred to by Fred Fensky were *purchase-price mortgages* and that the contracts relating to the same were executed prior to the death of Ferdinand Fensky. The question propounded to Mr. Campbell by Fred Fensky of Leavenworth, above referred to, clearly indicates that he had knowledge of these facts. He stayed at the home of Mr. and Mrs. Kraus during the two days he was in Topeka doing nothing but investigating these questions, and he talked to Mr. and Mrs. Kraus about what he was doing. [Tr. pp. 275, 277.] It is reasonable to presume that Mr. and Mrs. Kraus were informed of all that Fred Fensky had learned, if they did not already know it; also that Mrs. Pickens,

who “depended on Mr. Krauss” and who learned what she knew about the estate from Mr. Kraus, and who was guided in what she did by the action of her sister, Mrs. Kraus [Tr. p. 279], also had full knowledge.

Mr. Kraus *consulted lawyers*, as far back as October 5, 1903, for the purpose of seeing that his wife and appellants herein got their proper share of the estate. [Tr. p. 356.] Their brother, Mr. Fred Fensky of Leavenworth, also employed an attorney by the name of Mr. Jackson, who investigated the legal status of the land contracts referred to and other matters connected with the estate. [Tr. pp. 413, 415, 416, 422.] It also appears that Mrs. Wendt, the sister living in Germany, through the American consul, made an investigation, employing an attorney by the name of Slater, who wrote to California “to learn the condition of the estate in California,” and after investigation of the widow’s offer, came to the conclusion that her offer “was about the square thing.” [Tr. pp. 276, 423, 424.]

Can it be doubted from the foregoing facts but that appellants had actual knowledge of the existence of the land contracts in question? Having such knowledge, they were charged as a matter of law with knowledge of their legal effect on the title of Ferdinand Fensky at the time of his death. We believe the record justifies the conclusion that the attorneys who were consulted by the various brothers and sisters advised them that these contracts had no effect upon the title of Ferdinand Fensky and that the lands covered thereby descended direct to the widow and that such advice was communi-

cated to appellants at or about that time, to-wit: 1903-1905. Certainly it cannot be doubted that appellants had knowledge of facts which, if they had pursued with the slightest diligence, would have at once disclosed the existence of these land contracts and their legal effect. Certainly appellants cannot now truthfully say, as is alleged in their complaint, "that until late in the summer of 1912 they did not, nor did either of them, have any notice, knowledge or suspicion" of the existence of these contracts.

As to the value of the real property in California, which appellants claim was fraudulently represented to them to be worth far less than the real value thereof (but which the record shows was represented only to be "appraised" at the amount for which said real property was actually appraised), the description of these lands appeared of record in the inventory in the estate of Ferdinand Fensky in California, and nothing was done by anyone to prevent appellants from making inquiry as to the actual value of these lands. In fact, it appears that Mr. Slater, the attorney for the sister in Germany, did investigate the estate in California [Tr. p. 424], of which fact Mr. Kraus was informed by Consul Bischoff. [Tr. p. 276.]

It cannot be said that either Mr. Campbell or Jeanette Fensky ever did, or attempted to do, anything to conceal from appellants knowledge of the true value of the California real property. The intervenor and another nephew of appellants were in California at the time of the death of Ferdinand Fensky. [Tr. p. 625.]

With every means of securing information open to them, if they refused to make inquiries for over eight years they certainly must be held to come within the rule laid down in *Phelps v. Grady*, 168 Cal. 73, at page 79, from which we quote the following:

“It cannot be said, therefore, and of course it is not alleged, that Mrs. Phelps ever did or attempted to do anything to conceal from these intervenors knowledge of the true value of the land. If, under such circumstances, with every means of information open and patent before them, they may refuse to make inquiries for seven years, they may do so for seventy. There is an absolute failure to show not only due diligence but any diligence in seeking to discover during all this intervening time whether or not they had parted with their property at a fair valuation. The fact that they lived at a distance is of course no excuse. They were under no other disability.”

The supreme court of the United States, in the case of *Broderick's Will*, 88 U. S. 503, 22 L. Ed. 599, said:

“Parties cannot thus by their seclusion from the means of information, claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition and of the vicissitudes to which they are subject.” (21 Wall. 519.)

Neither the intervenor, Charles Fensky, whose father (also named Charles Fensky) was a brother of Ferdi-

nand Fensky, nor appellant Mrs. Schutt, testified at the trial. His complaint in intervention, seeking relief similar to that of the complainants, was filed at the *close* of the trial. [Tr. pp. 186-7.] His father died about September, 1907, [Tr. 188, 267.] *There is absolutely nothing in the record even indicating that appellant Schutt, and the intervenor and his father, did not have actual knowledge ten years or more ago of the matters and things now relied upon by them in seeking relief. Clearly, therefore, under the cases cited, the alleged cause of action of the appellant Johanna Schutt and the statutes of limitations, and we submit that the same is also true as to appellant Louisa Pickens.*

Appellants and the Intervenor Charles Fensky Are Barred by Their Own Laches from Any Recovery on the Ground of Fraud.

What has just been said relating to the statute of limitations applies also to the subject of laches, because in determining whether or not a claim is stale and barred by laches, courts of equity follow the analogy of the statute of limitations. We concede that the defense of laches is not available unless the lapse of time has resulted, or is presumed to have resulted, in prejudice to the appellees. But we submit that *the record shows not only actual prejudice to appellees by the great delay of appellants in commencing this action, but shows such circumstances that prejudice would be presumed from the great lapse of time, even if actual prejudice had not been proven.*

Prejudice may be presumed from mere lapse of time (Cahill v. Superior Court, 145 Cal. 42, 48), or from other circumstances showing that a change in position *might* have occurred (McNeill v. McNeill, 170 Fed. 289, C. C. A. 9th Cir. 1909), or if it appears that an important witness has died (Henchman v. Kelly, 54 Fed. 63, at page 666, C. C. A. 9th Cir.; Foster v. Mansfield Co., 146 U. S. 88, 100; Socrates, etc. v. Realty Co., 130 Fed. 293, 297, C. C. A. 9th Cir.).

It is stated in Kelly vs. Boettcher, 85 Fed. 65, 72 (C. C. A. 8th Cir) that if the statutory period has run "the burden is on plaintiff to show why it should be extended. It is on the complainant to show by suitable affirmance in his bill that it would be inequitable to apply it [laches] to his case." And so appellants must show not only lack of knowledge of the alleged facts upon which they ground their claim for relief, or of any facts putting them upon inquiry, but must also show that they have exercised the geratest diligence in discovering the facts and filing their bill of complaint. (Hardt v. Heidweyer, 152 U. S. 547, 548.)

When this case was before this court before, merely on the bill of complaint, the court being confined to the allegations appearing in the bill of complaint, held that it did not appear from the allegations of the complaint that the action was barred by laches. On this appeal, however, there is no such limitation or handicap.

As already pointed out, about eleven years have elapsed since the time of the alleged fraud of Campbell and Jeanette Fensky and the filing of plaintiff's bill of

complaint. During that time there have been three decrees in probate and both Mr. Campbell and Jeanette Fensky, the widow of Ferdinand Fensky, who were alleged to have committed the alleged fraudulent acts, have long since been dead, and are not here to protect their good names and characters. The original property of the estate with but few exceptions has been sold and changed in form a number of times, and its identity lost. Appellees herein have made valuable improvements upon the various properties deeded to them respectively by Jeanette Fensky, which appellants attempted to prove (but only by way of conjecture) was acquired with funds in which they claimed a small undivided interest. It appears that Mrs. Farnsworth made expenditures aggregating over \$3,000.00 for improvements, interest, taxes and insurance on property deeded to her and which was not covered by the income from the property. [Tr. p. 734.] Appellee Wellke went into possession of the five pieces of property deeded to him by Mrs. Fensky in 1908, upon three of which there were cottages. Since that time some of these properties have been sold and traded by him. He paid the taxes and paid off a mortgage of \$1,500.00 on the place where he lives and other expenses in connection with said properties amounting to over \$800.00 for interest, taxes, retaining wall, grading and other improvements. [Tr. p. 735.] Appellee Schmidt paid off a mortgage amounting to \$1,500.00 on the property deeded to him. [Tr. p. 736.]

It has been frequently emphasized by the courts that after the great lapse of time of the *death of important*

witnesses, it is easy for plaintiffs to charge fraud and almost impossible for defendants to meet the charges (Hinchman v. Kelly, 54 Fed. 63, 66, C. C. A. 9th Cir.; Foster v. Mansfield Co., 146 U. S. 88, 100; Socrates, etc. Mines v. Carr Realty Co., 130 Fed. 293, 297, C. C. A. 9th Cir. 1904; Robertson v. Burrell, 110 Cal. 568).

In Robertson v. Burrell, *supra*, the court, commenting on this fact, and the rule of equity, relating thereto, said:

“Moreover after the lapse of so much time and after the death of all the original parties, equity for the peace of society scrutinizes with great particularity bills such as this and is not satisfied to retain one unless the fullest possible credible showing is made by the applicants for relief. (Citing many other cases. Wood v. Carpenter, 101 U. S. 135, 143.)”

We quote the following pertinent extract from Hinchman v. Kelly, decided by this court:

“One of the particular reasons which have induced the courts to refuse to act is the difficulty of ascertaining the necessary facts to make it safe for a court of equity to exercise its judicial power, and this is especially so in a case like the one under consideration, when the means of resisting the trust, if unfounded, cannot be obtained on account of the death of the parties. In all cases where the complaining party has slumbered over his rights for a long period of time, with no obstacle in the way to prevent him from asserting them, until the evidence upon which such rights might be ques-

tioned and overthrown is lost, and all the original actors are dead, and their affairs left to heirs or representatives, it is deemed meet and proper that the law, in the exercise of its equitable jurisdiction, should presume it to be unjust, and refuse to allow the complainant to be heard. The peace and safety of society and the property rights of the general public demand this protection. *Prevost v. Gratz*, 6 Wheat. 498; *McKnight v. Taylor*, 1 How. 168; *Jenkins v. Pye*, 12 Pet. 241."

We submit that the foregoing quotations are strictly applicable to the case at bar and that appellants are clearly barred by their own laches.

PART II.

Appellants Are Not Entitled to Any Relief as Alleged Heirs at Law of Jeanette Fensky.

Appellants, realizing the obvious weakness of their alleged cause of action on the ground of fraud, have, in desperation, seized upon the claim that they are heirs at law of Jeanette Fensky, who in the same breath is charged with fraud. Appellants apparently neither see nor feel any indelicacy in their dual position. We submit, however, that they are not entitled to any relief whatsoever as alleged heirs at law of Jeanette Fensky, for the reasons next hereinafter stated.

DECREE OF DISTRIBUTION IN ESTATE OF JEANETTE FENSKY, APPELLANTS, IS VALID.

On this collateral attack all presumptions and intendments are in favor of jurisdiction, and the recitals in the

decree, and the evidence introduced show such jurisdiction affirmatively.

The record shows that, on September 22d, 1909, the superior court of Los Angeles county, sitting in probate, made and entered in the matter of the estate of Jeanette Fensky, its decree settling the administrator's final account and for final distribution of the estate, wherein, after reciting that the matter had come "on regularly this day for settlement and hearing," it is ordered, adjudged and decreed that said deceased left surviving as her "only heirs at law" the persons therein named, to-wit, "Eugene Wellke, Alma J. Schmidt and Amanda Katzung," and that the residue of said estate as shown by the final account, "and all other property belonging to said estate, whether described herein or not," be distributed to the persons therein named. [Tr. pp. 663, 664.] The plaintiffs and appellants here were not named in this decree either as heirs or distributees of the estate, and did not take any appeal therefrom. Counsel in his brief seems to concede that appellants are bound by that decree, unless the same can be impeached collaterally, for it is such a collateral attack which he is seeking to justify in the present action.

Van Fleet on Collateral Attack, Secs. 3 and 4;
Estate of Davis, 151 Cal. 318, 322-3.

Under the statutes of California, a proceeding for final distribution is a proceeding *in rem*, and jurisdiction is obtained by the giving of a notice either under sections 1633-4, or under section 1668, Code of Civil

Procedure, depending on whether the petition for final distribution is filed with the final account or after the final account. Section 1666 of the same code provides that:

“In the order or decree, the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession. *Such order or decree is conclusive* as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal.”

The supreme court of California in *William Hill Co. v. Lawler*, 116 Cal. 359, thus states the nature and effect of a decree of distribution:

“A proceeding for distribution is in the nature of a proceeding *in rem*, the *res* being the estate which is in the hands of the executor under the control of the court, and which he brings before the court for the purpose of receiving directions as to its final disposition. *By giving the notice directed by the statute the entire world is called before the court, and the court acquires jurisdiction over all persons for the purpose of determining their rights to any portion of the estate; and every person who may assert any right or interest therein is required to present his claim to the court for its determination. Whether he appear and present his claim, or fail to appear, the action of the court is equally conclusive upon him, ‘subject only to be reversed, set aside, or modified on appeal.’ The*

decree is as binding upon him if he fail to appear and present his claim, as if his claim after presentation had been disallowed by the court. (Estate of Griffith, 84 Cal. 107; Daly v. Pennie, 86 Cal. 552; 21 Am. St. Rep. 61.)"

116 Cal. 362..

In addition to the statutory notice that was given, it appears that appellants herein had actual notice of the proceedings on distribution of the estate of Jeanette Fensky. It is admitted by the pleadings that appellants, "through their children and otherwise, during the pendency of the proceedings * * * in the superior court of Los Angeles county, California, involving the administration of the estate of * * * said Jeanette Fensky, paid attention to said proceedings and from time to time secured copies of papers that were filed therein." [Tr. pp. 26-27, 53.] Notwithstanding that the petition for final distribution alleged that appellants Wellke, Schmidt and Katzung, the brothers and sisters, respectively, of the deceased, "are the next of kin and only heirs at law of said deceased [Tr. p. 655], and notwithstanding that if appellants' present contentions that they are heirs at law of the deceased, they would have been entitled to distribution of some part of the estate—although they admit paying attention to said proceedings [Tr. p. 27], appellants made no effort to appear therein to have their claims of heirship adjudicated. Had they done so and had they established their claims (which we submit they could never do) they would have been named in the decree of

distribution as to the properties subsequently distributed, and also been named as parties to the omnibus clause distributing all other property of the deceased whether described in the decree or not. The decree of distribution (rendered October 13, 1909) of all of the estate of the deceased, whether described in the decree or not, to said appellees has become final, no appeal having been taken.

No facts are alleged in the complaint, nor can it be claimed that there was any *extrinsic* fraud in connection with the estate of Jeanette Fensky by reason of which appellants did not contest said petition or did not appear in the administration of said estate.

The first point sought to be made by appellants against the decree, after thus remaining quiescent since October, 1909, is that it is void because of the alleged failure to give the statutory notice of hearing on the final account and petition for distribution. (Secs. 1633-4 Cal. Code Civ. Proc.) In support of this contention, appellants argue that proceedings in probate are special; that no intendments can be made in favor of the jurisdiction of the court; and that everything bearing upon the question of the court's jurisdiction must affirmatively appear in the record. None of these contentions, however, find any support in the law of California.

Under the constitution of California, adopted in 1879, the old probate court established by the constitution of California in 1849 (Art. VI, Sec. 8) was abolished, and original jurisdiction "of all matters of pro-

bate” as well as “in all cases in equity and in all cases at law which involve,” etc., were granted to the superior court. (Constitution 1879, Art. VI, Sec. 5.) Since 1879, the superior court, sitting in matters of probate, has been regarded as a court of *general jurisdiction*, and the *same presumptions and intendments* that attach to ordinary judgments of court of general jurisdiction when attacked, prevail.

In re Burton, 93 Cal. 459;

Burris v. Kennedy, 108 Cal. 331;

Estate of Davis, 151 Cal. 318;

McHatton v. Rhodes, 143 Cal. 275, 279;

Robinson v. Fair, 128 U. S. 53, 86.

In Burris v. Kennedy, *supra*, the supreme court of California said, referring to the jurisdiction of the superior court in probate matters:

“That court has general jurisdiction derived from the constitution. We have in this state no probate court, but superior courts are given jurisdiction of all matters of probate just as they are given jurisdiction of cases at law and in equity.

*“The grant of jurisdiction in regard to matters of probate is contained in the general definition of the jurisdiction of the court. After stating various classes of cases, or matters of which the court has jurisdiction, it is said, ‘and of all such special cases and proceedings as are not otherwise provided for.’ The court is not, therefore, while sitting in probate, a statutory tribunal, and does not derive its power from the act of the legislature. Nor are probate proceedings classed by the constitution as special proceedings * * **

“It (a probate proceeding) is a proceeding *in rem* which is not, in the technical sense, such a special proceeding unknown to the framework of the common law as will change the presumptions which attach to the action of the court, making it *pro hac vice* a court of inferior and limited jurisdiction.”

The rule announced in *Burris v. Kennedy*, *supra*, has never been judicially questioned in California, but has been uniformly applied by the courts.

In *Illinois T. and S. Bank v. Pacific Ry. Co.*, 115 Cal. 296 (cited with approval in *Mesnager v. De Leonis*, 140 Cal. 402), the California supreme court states the law as to collateral attack thus:

“It is well settled that as against such an attack, if the jurisdiction of the court can in any event be upheld and its action validated, this will be done even though the facts showing such jurisdiction are defectively stated and inferences must be indulged in to support the judgment. (*Van Fleet on Collateral Attack*, Sec. 17.)”

The same rule has been repeatedly announced.

In *Zilmer v. Gerichten*, 111 Cal. 73, 77, it is said:

“Conceding, however, that the proceeding for confirmation of the sale was irregular as claimed, and that notice of the sale was not published for the time required by the order of court, yet these irregularities or errors in the exercise of unquestionable jurisdiction would not invalidate the sale nor the administrator’s deed to the extent of mak-

ing them vulnerable to the collateral attack made upon them in the court below.” (Citing many cases.)

We quote from *McHatton v. Rhodes*, 143 Cal. 275, 278:

“The question as to the presumption of jurisdiction as to a domestic judgment is very fully considered *In re Eichhoff*, 101 Cal. 602, and it is there said: ‘The fact that the court has rendered a judgment implies a determination by it before it assumed to hear the controversy, that it had jurisdiction over the subject-matter of the action, and of the defendant against whom the complaint was directed. Its jurisdiction does not exist by virtue of its mere decision that it has jurisdiction, as that would be reasoning in a circle, but the presumption of its jurisdiction exists because it has been authorized to determine this question in the same mode as any other question of fact upon which its judgment is to rest, and its decision thereon is presumed to have been made upon evidence sufficient to sustain it. Its determination upon this question is to be made upon evidence of some nature, and, whether this evidence is sufficient or insufficient to support its conclusion thereon, it has the jurisdiction to make the determination; and if its conclusion is incorrect, it is merely error, which can be reviewed only upon a direct appeal. Even though it should determine the question without any evidence before it, the same presumption of verity attends its decision upon this point as upon any other issue which it may determine without evidence. Nor does this presumption of its jurisdic-

tion to make the decision depend upon the existence of any record of the decision."

Appellants base their attack against the decree upon the ground that an affidavit of posting of notice of hearing appearing on file shows the posting of a notice of hearing for "July 22nd, 1909," instead of for *September 22nd, 1909*," as fixed. [Tr. p. 661.] It does not appear from the record, however, that no other *proof* of posting was before the court on the day when it made and entered its decree. *Nor does it anywhere appear that in truth and in fact a correct notice was not posted in all respects as required by law.* It is the *fact of the posting of the notices*, and not the proof of posting which confers jurisdiction. (Herman v. Santee, 103 Cal. 519, 523; In re Newman, 75 Cal. 220.) From aught that appears in the record, the court at the time it entered its decree had before it ample evidence that a proper notice of hearing had been posted. (Sacramento Bank v. Montgomery, *supra*.) The decree itself recites that the matter had come on "*regularly this day for settlement and hearing.*" If a proper notice had not been in fact given, this recital would have been false; but under the decisions above cited, upon this collateral attack, the recital in the decree must be conclusively presumed to speak the truth.

Section 1638 of the Code of Civil Procedure of California reads as follows:

"The account must not be allowed by the court until it is first proved that notice has been given as

required by this chapter, and the decree must show that such proof was made to the satisfaction of the court, *and is conclusive evidence of the fact.*"

In the instant case the decree of distribution had combined with it the decree settling the final account to which alone the above section applies. But as the same identical notice was required, when both the final account and the petition for distribution are filed together (Secs. 1633-4, Cal. Code of Civil Procedure) the effect of the recital is the same.

Under the foregoing recital in the decree, it clearly appears that proof that notice had been given as required by the statute, was made to the satisfaction of the court, and such recital is therefore *conclusive*. Irrespective of the foregoing statute, the foregoing recital in the decree of distribution if not conclusive (as some of the cases hereinafter hold) is entitled to the greatest weight; and unless *it affirmatively and positively appears that notice was not posted, as required by the statute, it will be presumed that due and proper notice was given.*

In Estate of Davis, 151 Cal. 318, it was sought to collaterally attack the decree admitting a will to probate upon the ground that the hearing was originally noticed for November 30, 1896, while the order admitting the will to probate was entered on August 17, 1897, and that the record did not show any order or orders continuing the hearing. The decree, however, recited (as was done in the decree under consideration) that *the*

matter had come on regularly for hearing before the court. In its judgment sustaining the decree the California supreme court says:

“We find no provision in our statutes indicating that any orders continuing the hearing form a necessary part of the judgment-roll or ‘technical record.’ But even if they do, their absence would not invalidate the order admitting the will to probate. At most, the record is silent on the question of whether such orders were made, and in the case of a court of general jurisdiction, when a judgment ‘comes in question collaterally, service will be presumed when the record is silent.’ (Van Fleet on Collateral Attack, Sec. 830.) If, as contended by appellants, such orders form a part of the notice to which parties interested are entitled, *the recitals in the order admitting the will to probate, that the petition came on regularly for hearing, and that notice had been given ‘as required by law,’ are sufficient to justify the presumption that such orders were made, where the contrary does not affirmatively appear from record.* (People v. Davis, 143 Cal. 673 [77 Pac. 651]; Sacramento Bank v. Montgomery, 146 Cal. 745, [81 Pac. 138].)”

“This case does not come within the rule that where a service appearing in the record is insufficient it will not be presumed that any different and other service was made. This rule *‘has no application where the record does not purport to show ALL that was done, and the judgment states that all that was necessary to be done was done.’* (Sacramento Bank v. Montgomery, 146 Cal. 745, [81 Pac. 138].)”

151 Cal. 325-6.

Again, in *Estate of Chapman*, 158 Cal. 740, at p. 741, the supreme court of California said:

“The appeal is based on the proposition that the order of February 7, 1908, discontinuing the family allowance from and after October 4, 1907, was absolutely void because the court had no power to make it. This contention is founded on the assertion that it was made *ex parte*, and without any notice to the widow. The record contains nothing to that effect. The order recites that it was made upon good cause, but neither the recital nor anything else in the record before us states anything at all on the question whether or not notice thereof was given. *Orders in probate proceedings need not recite the existence of the facts upon which jurisdiction to make them depend.* (Code Civ. Proc., Sec. 1704.) The order was appealable and it has become final. The attack upon it was and is wholly collateral. The presumption in regard to such orders, upon such collateral attack, is the same as in other cases; *the jurisdiction of the court to make them is presumed, unless the contrary appears from the record*, or from competent evidence in a proper attack. Upon this record we must presume that the necessary notice was given and that the order discontinuing the family allowance was valid and binding.” (pp. 741-2.)

In *Robinson v. Fair*, 128 U. S. 53, 86, the court said:

“It remains to consider whether the decree of partition is void upon grounds other than those relating to the constitutionality of the statute under which the probate court proceeded. The circuit court of the United States had no jurisdiction

to set aside that decree, merely upon the ground of error, nor could it refuse to give it full effect, unless the probate court was without jurisdiction of the case. * * * And in determining the question of jurisdiction, it must be remembered that probate courts of California have had for many years the rank of courts of general jurisdiction, and, as said in *Burroughs v. De Coutts*, 70 Cal. 361, 372, their proceedings, 'within the jurisdiction conferred upon them by the law, are to be construed in the same manner and with the like intendments as the proceedings of courts of general jurisdiction, and their judgments have like force and effect as judgments of the district court.' Probate courts being, then, courts of superior jurisdiction, in respect to the settlement, distribution and partition of estate coming within their cognizance, *the recitals in the decree of partition unless contradicted by the record, will be presumed to be correct, and every intendment will be indulged in its support.*" (Citing cases.)

Hall v. Law, 102 U. S. 461, was a collateral attack upon a decree of partition. The supreme court of the United States said:

"The validity of this partition is assailed because no complaint or petition of the applicant for the partition appears in the record as the foundation of the proceedings, and without one it is contended that they were void."

"The recitals in the order show a compliance with the statute; they show jurisdiction in the court over the subject. That jurisdiction arises upon the presentation of the application, accompa-

nied with proper proof of proper notice of it. *The order of the court appointing the commissioners is a determination that the application is sufficient, and that due notice of it has been given.* This conclusion is not open to collateral attack; it can only be questioned, on appeal or writ of error, by a superior tribunal invested with appellate jurisdiction to review.

In Applegate v. Lexington, etc. Mining Co., 117 U. S. 255, 259, the court said:

“The court which made the decree in the case of *Clark v. Conkling* was a court of general jurisdiction. Therefore, every presumption not inconsistent with the record is to be indulged in, in favor of its jurisdiction. *Kempe's Lessee v. Kennedy*, 5 Cranch, 173; *Voorhees v. Bank of the United States*, 10 Pet. 449; *Grignon v. Astor*, 2 How. 319; *Harvey v. Tyler*, 2 Wall. 328. It is to be presumed that the court before making its decree took care to see that its order for constructive service, on which its right to make the decree depended, had been obeyed. That this presumption is authorized will appear by the following cases: * * *

In *Johnson v. Canty*, 162 Cal. 391, one of the links in the plaintiff's chain of title was a decree of distribution, and the plaintiff accordingly offered in evidence a certified copy of such decree, to the admission of which the defendant objected upon the ground that there was “no showing that the court had acquired jurisdiction of the estate.” The trial court overruled the objection, and this ruling was assigned as error.

The supreme court of California in affirming this ruling, said:

*"It is well settled in this state that the same presumption exists in favor of the acts of the superior court done in the exercise of its probate jurisdiction, as exists in favor of its acts in ordinary litigation between parties. It is provided by our statute that it is to be presumed that a court or judge acting as such * * * was acting in the lawful exercise of his jurisdiction." (Code Civ. Proc., Sec. 1963, Subd. 16.) It is to be borne in mind that we have no statute prescribing, as in the ordinary action, what papers shall constitute 'the judgment-roll' or 'record' of a judgment or order in probate proceedings in the courts of this state. We can see no good reason why a decree like the one received in evidence in this matter should not be held to afford presumptive evidence of the jurisdiction of the court to render it. In Estate of Schandoney, 133 Cal. 387, [65 Pac. 877], this court applied the presumption above stated in a guardianship proceeding, quoting Freeman on Judgments, section 124, as follows: 'Nothing shall be intended to be out of the jurisdiction of the superior court but that which expressly appears to be so. Hence, though the existence of any jurisdictional fact may not be affirmed upon the record, it will be presumed upon a collateral attack that the court, if of general jurisdiction, acted correctly and with due authority, and its judgment will be as valid as though every fact necessary to jurisdiction affirmatively appeared.' (See, also, Estate of Eikerenkotter, 126 Cal. 54, [58 Pac. 370].) It is expressly provided by our statute that a certified*

copy of a decree of distribution must be recorded in the county recorder's office (Code Civ. Proc., Sec. 1719), and that from the time of such filing, notice is imparted to all persons of the contents thereof. (Code Civ. Proc., Sec. 1706.) *It thus appears to have been contemplated that the decree itself should afford evidence of the transmission of the title of deceased.* It is expressly provided by section 1704 of the Code of Civil Procedure: 'Orders and decrees made by the court, or a judge thereof, in probate proceedings, *need not recite the existence of facts*, or the performance of acts, upon which the jurisdiction of the court or judge may depend, but it shall only be necessary that they contain the matters ordered or adjudged, except as otherwise provided in this title. All orders and decrees of the court or judge must be entered at length in the minute book of the court.' "

162 Cal. 395-6.

It will be observed from the case last cited, that *the technical record of the decree of distribution consists only of the decree itself*, and consequently, that *the affidavit of posting of the notice of the hearing, is not a part of such technical record.* The rule that where the record recites what was done, that it will not be presumed that anything else or different was done, therefore has no application to the erroneous affidavit of posting relied upon by appellants.

The statute of California nowhere provides for the filing of an affidavit of posting. The affidavit of posting is mere evidence to be adduced at the hearing in

order that the court may determine that jurisdictional notice has been given. There may be a number of affidavits or other evidence from which the court could determine the sufficiency of the notice given. It does not appear that the recital in the decree of distribution here involved was at all based upon the erroneous affidavit in question. ¹ It may have been made to appear, and we submit that upon the evidence hereinafter pointed out it did appear to the court that another affidavit showing due posting was filed, and that the recital was based upon the fact.

In this connection we wish to quote the following extract from *Sacramento Bank v. Montgomery*, 146 Cal. 745, where the statute required the return of summons to be made within three years after the commencement of the action, and the only affidavit or return found on file appeared to have been filed after the expiration of three years. The court, in upholding the validity of the judgment, said:

"But such affidavit is not the only evidence upon this subject. The jurisdictional recitals in the judgment also constitute a part of the record, and it is there solemnly declared that the default of the defendant R. H. McDonald has been regularly entered according to law. Assuming here the soundness of defendants' argument to the effect that the court lost all jurisdiction of the case if an affidavit of publication was not filed within the three years, this recital could not be true if no affidavit had been filed prior to the one con-

tained in the record. *The whole record must be construed together, and the jurisdictional recitals in the judgment must be taken on collateral attack as true, unless the record affirmatively shows that the facts upon which they are based are insufficient to sustain them. The remainder of the record does not show this. It does not appear that the recital that default was regularly entered according to law was at all based upon the affidavit contained in the record. For aught that appears, it may have been made to appear to the court in that action that another affidavit showing due publication was filed within the proper time, and the recital may have been based upon the fact. Such affidavit may have been lost or omitted from the record. Such a condition of affairs is entirely consistent with the whole record before us, and in support of the judgment must be assumed to have existed. To hold otherwise would be to make the record in part speak falsely."*

146 Cal. 751.

These appellees are not dependent upon the finding of the requisite jurisdiction of the probate court contained in the decree and the presumptions and intentions in favor of jurisdiction, for the record shows that in truth and in fact the notice which was actually posted truly stated the date fixed for the hearing of the petition for distribution. The witness Glaze, a deputy county clerk whose duty it was to post the proper notice [Tr. 739] and who alone was posting such notices for the county clerk at the time [Tr. 745], testified that after the date of

the hearing had been fixed it was the uniform practice to endorse the date actually fixed on the back of the petition. [Tr. 739.] The petition in the case at bar shows that the true date of hearing was endorsed at the foot of the petition [Tr. 657] and also on the reverse side. [Tr. 660.] It was also Mr. Glaze's uniform practice to fill in the date of hearing set for the petition in the printed form of notice [see Tr. 747] actually posted from the notation endorsed at the foot of the petition and also on the reverse side as aforesaid. [Tr. 739-40.] Since at its foot and on the reverse side of the petition it showed a correct endorsement of the true date of the hearing, and the date of the hearing in the notice actually posted was filled in by Mr. Glaze [Tr. 739-40], from the date endorsed on the face and on the reverse side of the petition, it must be inferred that the notice actually posted contained the true date of the hearing. It is the notice actually posted that is material, and not the copy of the notice set forth in an affidavit of posting.

Furthermore, the register of actions of the county clerk of the Estate of Jeanette Fensky introduced in evidence [Tr. pp. 741, 742] contains the following entries:

- "Sept. 11 Notices et. final acct. hearing pet. & aff.
filed.
" 13 " hearing pet. for dis. filed.
" 22 Decree showing due Notice filed 12/134.
" 22 Aff. and decree filed 12/135."

It is to be noted that in the entries for September 11 and 13 that the word notices is used in the plural,

and also that an affidavit relating to notices was filed on September 11 and another affidavit on September 22, and that on September 22 a decree showing due notice was filed. Mr. Glaze also testified that the entries in the register of actions were made "from the papers found on file." [Tr. 745.]

Moreover, the record shows that three days after the filing of the final account and petition for distribution, the administrator filed a supplemental petition for distribution, and the record shows without conflict that notice of the hearing on this petition was given for ten days, as required by law. The witness Charles Glaze testified that "on that date (September 11th, 1909) I posted notice of the supplemental petition for final distribution." [Tr. p. 740.] Appellants contend, however, that the court was without jurisdiction to hear this supplemental petition for distribution, because it was not filed *with* the final account as authorized by section 1634 of the Code of Civil Procedure, and attempt to support that contention by the citation of authorities. While it may be true as a general proposition that a petition for distribution is premature if filed before the settlement of the final account, unless it is filed *with* the final account, in the instant case a petition for distribution was in fact filed *with* the final account. This empowered the court to order distribution on the 22nd day of September, 1909. The so-called supplemental petition was in all respects identical with the original petition on file, with the exception that it recited a gift by the decedent during

her lifetime of a certain promissory note, which had been subsequently collected, and with the written consent of the heirs the administrator asked leave of court to pay to the donee of the note in question the amount of the same. The petition was, therefore, at most simply an *amended* petition, and not a new petition, and the same was set down for hearing and heard on the same day with the original petition. [Tr. p. 663.] The donee of the note in question would have had the absolute right to appear at the date of the hearing of the petition for distribution and apply to have the proceeds of said note paid over and distributed to her; and this was the sole purpose of the administrator in filing his so-called supplemental petition.

In the face of this showing upon the register of actions and the testimony of the deputy county clerk above referred to, and the recital in the decree of distribution of "the final account and petition for distribution herein * * * *coming on regularly this day for settlement and hearing*, and no person appearing to except to or contest said account or said petitions, *the court after hearing the evidence* settled said account and orders distribution of said estate as follows" [Tr. 663], we submit that the record affirmatively shows that proper notice was posted and that the court on the day of the hearing upon sufficient evidence determined such to be the fact, as shown by the recital in the judgment and also by the "decree showing due notice" filed September 22, referred to in the register of actions.

The cases cited by appellant relating to the presumptions arising on collateral attack of probate decrees in California, were decided prior to the adoption of the Constitution of 1879, or have been overruled. The case of *Estate of Sharon*, 179 Cal. 447, particularly relied upon by appellants in support of their claim that no presumptions should be indulged in in support of the jurisdiction of the court, was not a probate proceeding but was an adoption proceeding. Such a proceeding is special and is more in the nature of a private contract than a judicial proceeding, as is shown by the following extract from the decision:

“The right to adopt a child, and the right of a person to be adopted as the child of another, are wholly statutory. Such right is unknown to the common law. He who claims that an act of adoption has been accomplished must show that every essential requirement of the statute has been strictly complied with. (*Ex parte Clark*, 87 Cal. 641 [25 Pac. 967]; *In re Stevens*, 83 Cal. 331 [17 Am. St. Rep. 252, 23 Pac. 379].) In *Estate of Johnson*, 98 Cal. 531, 538 [21 L. R. A. 380, 33 Pac. 460], after careful consideration of the question as to what requirements are essential, the conclusion was stated as follows: ‘*The proceeding is essentially one of contract between the parties whose consent is required.*’”

179 Cal. 454.

The other case upon which appellants particularly rely, to-wit, *Beckett v. Selover*, 7 Cal. 233, was overruled by the many later cases cited, and was specifi-

cally repudiated in *Irwin v. Scheiber*, 16 Cal. 500, 503, 505-6.

Section 1638 of the Code of Civil Procedure, relied on by appellants, was not only complied with as shown by the recitals in the decree, but by its terms relates only to a decree settling an "account" and not to a decree of distribution, which is governed by section 1704 of the same code, which specifically provides probate decrees need not recite any facts showing the jurisdiction of the court. That section, alone, governs decrees of distribution.

Estate of Chapman, 158 Cal. 740;

Johnson v. Canty, 162 Cal. 391.

We wish also to point out that *Beckett v. Selover*, *supra*, relied upon by appellants, was decided *before* the enactment of section 1704 C. C. P., and *before* the adoption of the Constitution of 1879, since which time the superior court sitting in probate has uniformly been held to be a court of *general* jurisdiction.

The Decree of Distribution in the Estate of Jeanette Fensky Conclusively Adjudicated that Appellees Wellke, Schmidt and Katzung Are the "Only Heirs at Law" of Jeanette Fensky.

Not only was the superior court required by sections 1665 and 1666 of the Code of Civil Procedure to name in the decree of distribution "the persons and the proportions or parts to which each shall be entitled," but the decree of distribution in the case at

bar did adjudicate "that said deceased left surviving as her only heirs at law the following brother and sisters, to-wit, Eugene Wellke, Alma J. Schmidt and Amanda Katzung," and distributed the property described in the decree "and all other property belonging to said estate whether described herein or not," to said appellees. [Tr. pp. 663-664.] Said proceeding is *in rem* to which all the world was a party, including appellants, and the statute also provides "such order or decree is conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside or modified on appeal." California Code of Civil Procedure, Sec. 1666.

The William Hill Co. v. Lawler, 116 Cal. 359.

In the case last cited, it was held that the decree of distribution is binding upon all persons whether they appear in the estate or not. It therefore follows that the decree is *res adjudicata* as to who are the heirs at law or Jeanette Fensky.

Appellants claim that the administrator Merriam, one of the appellees herein, had actual knowledge that they were heirs at law of Jeanette Fensky, and by representing in the petition for final distribution that appellees Wellke, Schmidt and Katzung,—the surviving next of kin,—were the only heirs at law of said deceased, acted fraudulently and falsely, and in effect, that the finding of the court is based upon perjured testimony. We respectfully submit that there is nothing in the record showing any knowledge upon the

part of appellee Merriam that appellants were heirs at law, or claimed to be heirs at law. Furthermore, that in truth and in fact, as is pointed out in the next subdivision of this brief, appellants never were in fact heirs at law of Jeanette Fensky, under subd. 8 of section 1386 of the Civil Code of California, under which they claim. To charge defendant Merriam with such knowledge, the court would have to presume facts not proven, and charge the defendant Merriam as a matter of law with knowledge as to the sources from which the deceased originally acquired the property left by her at her death. The various limitations and restrictions on the subdivision of section 1386 are pointed out, together with their application to the case at bar, in the next subdivision.

We submit that the entire record of the administration of the estate of Jeanette Fensky shows throughout that administrator Merriam correctly and in good faith regarded the next of kin of Jeanette Fensky as her only heirs at law, and that everything that was done in the administration of said estate was done with their approval and consent. It is admitted by the pleadings that appellees paid attention [Tr. p. 27] to the administration proceedings in said estate, and if they failed to have their heirship established therein, it was their fault and not the fault of appellee Merriam.

Assuming for the sake of argument, that there was any false testimony as to who were the heirs at law of the deceased (which there clearly was not), such

would be intrinsic fraud, not a ground for relief in a court of equity.

United States v. Throckmorton, 98 U. S. 61, 65,
25 L. Ed. 93.

Complainants Have Not, and Never Had, Any Rights as Heirs of Jeanette Fensky Under Paragraph 2 of Subdivision 8 of Section 1386 of the Civil Code of California.

The provision of the statute relied upon by appellants reads as follows:

“If the deceased is a widow, or widower, and leaves no issue, *and the estate, or any portion thereof, * * * was separate property of such deceased spouse, while living, and came to such decedent from such spouse by descent, devise, or bequest, such property goes in equal shares to the children of such spouse and to the descendants of any deceased child by right of representation, and if none, then to the father and mother of such spouse, in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such spouse and to the descendants of any deceased brother or sister by right of representation.*”

(1) In Estate of Brady, 171 Cal. 1, it was held that this subdivision applies to the *identical property* and also to any property into which it may have been converted, *if it can be traced*. Of course, property of the surviving spouse, not proven to have been received (1) *by descent*, (2) *from the pre-deceased spouse*, or to

be the proceeds or avails of such property, goes to the blood relatives alone of the surviving spouse under other provisions of section 1386, C. C. (Estate of Watts, 179 Cal. 20.) But, as is elsewhere in this brief pointed out, complainants have failed to trace, with that degree of certainty required, or at all, any of the property of Ferdinand Fensky at his death into any particular property of Mrs. Fensky at the time of her death. In the absence of such proof, under the foregoing authorities, subdivision 8 of section 1386 of the California Civil Code is inapplicable to any of the estate of Jeannette Fensky.

(2) Neither does the section apply to property which the surviving spouse has by deed *inter vivos* or by will disposed of during the lifetime of such surviving spouse. The heirs of the predeceased spouse during the lifetime of the surviving spouse have nothing more under this subdivision than an "expectancy," which is defeated if the surviving spouse either during her lifetime deeds the property away or disposes of it by will. The Legislature has simply enacted a rule of succession in regard thereto, in the event the surviving spouse dies intestate *without having previously disposed of the property*.

Estate of Brady, 171 Cal. 1;

Veirs v. Roberts, 28 Cal. App. Dec. 297.

Mrs. Fensky deeded away practically all of her California property to the defendants herein; it therefore follows that, even though complainants had been suc-

cessful in tracing and showing that such property, or some part thereof, was the "proceeds or avails" of separate property of Ferdinand Fensky at the time of his death, which came to Mrs. Fensky *by descent*, subdivision 8 of section 1386 of the California Civil Code would still not be applicable, or of any avail to complainants.

(3) Subdivision 8 of section 1386, California Civil Code, is not applicable in any event to the larger portion of the estate of Jeanette Fensky for still further reasons:

(a) The statute does not apply to the one-half of the Kansas realty (including the lots covered by the sales contracts) which Jeanette Fensky already had, as his wife, for it was hers of her own right, and not from him *by descent, devise or bequest*,—or to the proceeds or avails thereof. (Sec. 2942 Gen'l Stats. Kansas 1909.) Under the statutes of Kansas, the wife's interest in realty "does not depend for its inception upon the death of the husband, as an inheritance would, but *springs into existence by operation of law upon a concurrence of seizin and the marriage relation*. This interest equaled one-half in value of all the real estate in which the husband at any time during the marriage had a legal or equitable interest, and which has not been sold on execution or other judicial sale, and which the husband had not conveyed at a time when his wife was not, and never had been, a resident

of the state, and which is not necessary for the payment of his debts.”

McKelvey v. McKelvey, 75 Kan. 325, 89 Pac. 663.

(b) Furthermore, the statute, when properly construed, does not apply to the *other half of the Kansas realty* (including the lots covered by the sales contracts), for this descended to her *under the laws of Kansas*, and not under the laws of California. Statutes are not presumed to have any extra-territorial effect. (Lewis' Sutherland on Statutory Construction, § 13.) Other states, including Kansas, make no distinction between “separate” and “community” property; in such states the terms are unknown. So it cannot be said that the interest of Ferdinand Fensky in the Kansas realty or any other property not descending under the laws of California, comes within the proper meaning of section 1386 of the Civil Code of California. What is said herein as to land of course applies to the rentals and revenues from said land also.

(c) Furthermore, the property set apart to Mrs. Fensky as a homestead [Tr. pp. 632-3] did not go to her by *descent, devise or bequest*, but under the special statutes relating to probate homesteads. (Sec. 1465, Cal. Code Civil Procedure.) There being no minor children, such property was the absolute property of the widow, Mrs. Fensky. (Sec. 1468, Cal. Code Civil Procedure.) The complainants were never, therefore, heirs of Mrs. Fensky under this statute as to such

property, or as to the proceeds or avails thereof. (Estate of Beer, 55 Cal. Dec. 589.)

(d) Neither does the statute apply to the Stein, Sims and Kimmerly notes which were given to Mrs. Fensky by her husband prior to his death, and therefore were not his property at the time of his death. That subdivision 8 does not apply to property given by one spouse to the other before death, was specifically held in Estate of McCauley, 138 Cal. 546.

(e) Neither does the statute apply to the proceeds of the joint bank account [Tr. p. 252] or to the joint certificate of deposit. [Tr. p. 258.] In Estate of Beer, 55 Cal. Dec. 589, it was held that this provision applies only to "such property as comes by will or under the law of succession to the surviving spouse directly from and through the deceased spouse," and hence did not apply to a homestead which *by operation of law*, and not by descent, went to the surviving husband upon the death of the wife. The proceeds of the joint bank account went to Mrs. Fensky upon the death of her husband, *by operation of law*, by right of survivorship, and not by descent.

Crowley v. Sav. Union Bank, 30 Cal. App. 144;

Kennedy v. McMurray, 169 Cal. 287;

Estate of Harris, 169 Cal. 725.

So the section would not apply.

(f) Mrs. Fensky had some property of her own at the time of her marriage, and she later received a bequest from an old sweetheart. [Tr. p. 624.]

Clearly, the section by its own terms does not apply to this or the proceeds or avails thereof.

So, even though the statute relied upon had not been made entirely inapplicable by Mrs. Fensky's deeding away the property to the defendants prior to her death, still the statute would not, for the reasons above stated, apply to (a) the one-half interest in value of the Kansas realty, including the lots covered by the sales contracts in Fensky's Addition which Mrs. Fensky had as wife, nor to (b) the other half-interest therein which came to her under the laws of Kansas, and not under the laws of California, nor (c) to the property set apart to Mrs. Fensky as a homestead, nor (d) to the notes and the bank account given to Mrs. Fensky by her husband prior to his death, nor (e) to the joint bank account which Mrs. Fensky received by operation of law, and not by descent, nor (f) to the property that Mrs. Fensky had at the time of her marriage, or that which she later received by bequest from an old sweetheart. *These items constituted almost all of her estate.*

(4) The remainder of her estate to which the statute might otherwise be claimed to be applicable, was so mingled with her other property that it cannot be traced to its origin as a part of the separate property of Ferdinand Fensky, and therefore subdivision 8 cannot be applied even to it.

We quote the following extract from *Estate of Brady*, 171 Cal. 1, at p. 5:

“It may also be conceded that if such community property is by the husband so mingled with his other property that it cannot be traced to its origin as a part of the community property, subdivision 8 could not be applied.”

In *Estate of Brady*, the husband survived the wife, and the alleged mingling of what had once been community property of himself and wife with his own separate property occurred subsequent to the death of his wife, but was traced and established to be the proceeds of the identical property existing at the wife's death. Had such property been so intermingled, however, that it could not be traced, then subdivision 8 would (as the court states) not be applicable. The court also points out that the heirs of the predeceased spouse have nothing more than an “expectancy” in the property or its proceeds, during the life of the surviving spouse, and that the title of the surviving spouse is in no way affected by such expectancy. It therefore follows that the surviving spouse has a perfect right to sell it, give it away by deed or will, or to intermingle the property so as to lose its identity, even though the result is to defeat such expectancy.

(5) But even though such property had been sufficiently traced so that the court could properly find that at least some part of the property owned by Mrs. Fensky was the proceeds or avails of what had once been the separate property of Ferdinand Fensky, to

which the statute could have been held applicable, still complainants are entitled to no relief in this suit. They should have asserted such claim in the probate proceedings for the administration of the estate of Jeanette Fensky, and made proof showing that they were entitled to distribution of such portion of her estate. Not having done so, they are barred by the final decree of distribution in that estate, for the reasons already set forth in this brief.

There Are No Unadministered Assets of the Estate of Jeanette Fensky.

We wish to point out at the very start that even if there were any unadministered assets of the estate of Jeanette Fensky, it would be of no avail and of no concern to appellants herein, for two reasons: First, because the heirs at law of said deceased were conclusively adjudicated by the decree of distribution; and second, because appellants never were in fact heirs at law of the deceased, under the peculiar statute under which they claim. There are in fact no unadministered assets of the estate, for *two* reasons:

First, because the decree on its face distributed not only the property described in the decree, but "all other property belonging to said estate whether described herein or not." [Tr. pp. 663-664.] It is well settled by the decisions of the California supreme court that such an omnibus clause in a decree of distribution (which is quite commonly inserted for the very purpose of covering any assets accidentally omitted from

the decree or afterwards discovered), is valid. The rule is thus stated in *Heydenfeldt v. Osmont*, 178 Cal. 768, 773:

“In the first place, it must be remembered that *under the decisions of this court decrees which by their terms distribute a residue known or unknown are sufficient to pass title to lands omitted from the particular description.* (*Smith v. Biscailuz*, 83 Cal. 344.) By such a decree the court is required to distribute all the residue to the persons entitled, and its order and decree are conclusive in this regard as to the rights of all distributees. (Code Civ. Proc., Sec. 1666; *Humphrey v. Protestant Episcopal Church*, 154 Cal. 455; *Marcone v. Dowell*, *ante*, p. 396.) It was the duty of the court making the distribution to decide who was entitled to the residue.”

By the decree of distribution, therefore, there was distributed to the appellees named therein all the title to all property of every description which Jeanette Fensky owned at the time of her death. If any of the deeds or gifts or other items hereinafter referred to were invalid for any reason, the only effect of such invalidity would be that under the decree of distribution the title to any such property would pass in undivided interests to the distributees named in the decree. No further administration upon the estate would be required.

Second, the property *claimed* to have belonged to the estate of Jeanette Fensky at the time of her death,

was not proven to be property belonging to Jeanette Fensky at the time of her death.

The appellants having alleged that certain property belonged to the estate of Jeanette Fensky which was not accounted for by the administrator, the burden of proof of such allegations is clearly upon them. We submit that such burden of proof has not been sustained, but that the weight of the evidence is to the contrary.

All of the Deeds Given by Jeanette Fensky to Her California Heirs Were Delivered During Her Lifetime.

The testimony as to the delivery of these deeds will be found in the transcript at pp. 565-75; 622-4, 510-522. It will be seen that somewhat early in the last illness of Jeanette Fensky she sent for Mr. Ferguson, for the *expressed purpose of "disposing of her property and that she wanted to do it by deeding it to the people that she wanted it to go to."* [Tr. p. 573.] It is perfectly apparent that Jeanette Fensky was seeking thereby to make a present and final disposition of her property to her kindred, retaining only a life estate in the property. Pursuant to her instructions, Ferguson had the deeds prepared. As each one was signed she delivered it to Ferguson and instructed him to take and retain them in safe keeping until her death, and, the day after her death, to put them of record. [Tr. pp. 622-4, 566.] *She uttered not one word indicative of a desire or an intention to retain any domin-*

ion or control whatsoever over the deeds, or any of them. She intended that title to the property should thereby immediately pass to the grantees, she retaining a life estate in the property, and that Ferguson should hold the deeds as trustee for the grantees until her death. So far as she was concerned, the delivery was absolute. In her will, therefore, although the Kansas realty is mentioned, *she does not mention or dispose of the land covered by any of these deeds* [Tr. p. 732], for she knew as to such land that she had nothing to dispose of by will. So far as the grantees (who were present) [Tr. pp. 622-4] were concerned, the delivery was likewise absolute. We have here all of the elements of a valid, effectual and irrevocable delivery.

The depositary in such a case is the trustee of an express trust, with duties toward each of the parties which neither one thereof alone can forbid or enjoin. (Williams v. Kidd, 176 Cal. 367.)

Appellants sought to avoid the effect of the delivery of these deeds at the trial by proof that Mrs. Fensky had suggested to Mr. Ferguson that if he could sell the property at a profit, he should do so and she would "*make it right*" with the grantees, or words to that effect. Appellants have discussed the evidence on this point on this appeal as if there were no conflict in the testimony, and as if the decision in the lower court had been in their favor. Neither of the two witnesses upon whose testimony they rely could definitely remember the conversation had with the grantor at the time of the delivery of the deed. Neither could definitely

say just when the suggestion as to the future sale of the property was made. Mr. Parmele, when pressed for a definite statement of just what had been said replied, "It is so long ago I have forgotten just what the conversation was. I have forgotten the exact wording." [Tr. p. 517.] Mr. Ferguson, the depository of the deeds, when likewise pressed for the language used, said: "The instructions were to hold them (the deeds) until her death." [Tr. p. 566.] "She told me to record the deeds upon her death and I did so. The deeds were in my custody until her death. *They were never back in her hands.*" [Tr. p. 573.]

Minnie F. Farnsworth, one of the grantees, who had lived with her since her husband's death [Tr. p. 622], in whose presence the deeds were delivered, related the incident as follows:

"After the various documents were signed, she (Mrs. Fensky) looked to Mr. Ferguson and said, 'You take these papers and hold them, and in case of my death, record them the next day.' * * * *I did not hear my aunt say to Mr. Ferguson in effect, 'You can sell any of this property that you want, or handle it just as you used to.'* *I did not hear her say anything other than what I have just stated.*" [Tr. p. 623.]

It should be remembered that the trial court had the opportunity to observe these witnesses and to more accurately determine which of the evidence as to a transaction so long since past could be relied upon.

For this reason every inference is indulged in in support of its decision.

Mastin v. Noble, 157 Fed. 506, 85 C. C. A. 98;
U. S. v. Marshall, 210 Fed. 595, 127 C. C. A.
231;

De Laski etc. Co. v. U. S. Tire Co., 235 Fed.
290, 292.

Furthermore the grantees named in the deed having produced the deed and the same being dated and acknowledged prior to the death of Mrs. Fensky, the burden of proof of non-delivery on the date the deeds bear was on the complainants.

Civil Code of Cal., Sec. 1055;

Zihn v. Zihn, 153 Cal. 405;

Phillips v. Minotte, 167 Cal. 328.

BUT EVEN TAKING THE DISPUTED EVIDENCE INTRODUCED BY APPELLANTS AS AN ASSUMED STATE OF FACTS, THE DELIVERY WAS SUFFICIENT AND PASSED A PRESENT INTEREST, FOR IT WAS UNCONDITIONAL AS RESPECTS THE INSTRUMENT.

A clear *distinction* is recognized in the law applicable to the delivery of deeds *between the power of control over the instrument and control over the property*. The former is the test of delivery of a deed. This is illustrated by the following authorities:

In Long v. Ryan, 166 Cal. 442, suit was brought to set aside a deed. On the day of its date, a deed executed by Sarah M. Ryan purporting to convey cer-

tain parcels of land to her two daughters, was delivered in a sealed envelope to the Title Insurance and Trust Company as custodian upon certain contingencies. The contingencies, however, did not happen within the time fixed, and finally the grantor endorsed the envelope while it was still in the possession of the custodian as follows:

“This deed you will hold until July 22, 1910, at which time, if I be then living, you will deliver the same to me, but if I should die in the meantime, you will thereupon immediately upon my death deliver said deed to my daughters Mary N. Ryan and S. Maude Ryan.”

Upon her death, the deed was so delivered. The court held the grantor retained *the power of control over the deed* and there was no delivery. The court said on page 444:

“It has been many times declared by this court that where the owner of land signs a deed therefor to one person and thereafter delivers such deed to a third person, with directions to such third person to hold the same during the lifetime of such grantor and upon the grantor’s death to deliver it to the grantee, intending at the time of such delivery to the custodian to part forever with all right or power thereafter to repossess, retake, or control *the deed*, such delivery is effectual and valid, and upon the death of the grantor the estate goes, by virtue thereof, to the grantee, who may then compel delivery, if necessary. * * *

(Cases cited.)

But these decisions declare that it is essential to the validity of such delivery that it shall be made without any conditions whereby the grantor may again obtain *control of the deed*. In *Bury v. Young* the court says: 'The essential requisite to the validity of a deed transferred under circumstances as indicated in this case, is that when it is placed in the hands of the third party, it has passed beyond the control of the grantor for all time.' * * * In *Moore v. Trott* the court, referring to the delivery to a third person, says that such delivery is valid, 'provided always—and this is the essential condition of the validity of such transfers—that the delivery is absolute so that the deed is placed beyond the power of the grantor to recall it or control it in any event.' "

In *Moore v. Trott*, 162 Cal. 268, the grantor executed deeds in favor of his wife and delivered them to his agents with instructions to deliver them to the grantee if he should die at a hospital whither he was going for an operation. He returned, however, from the hospital and *reinstucted his agent to hold the deeds and deliver them to his wife upon his death*. The case first reached the supreme court on appeal based upon the first instructions given by the grantor, and it was there held that as there was a clear implication therein that if the grantor should return from the hospital the deeds were to be at his disposal, there was no adequate delivery. (156 Cal. 357, cited by complainants.) On the second appeal, however, it was held that the *subsequent instructions above mentioned*

given by the grantor constituted a complete delivery, the court saying, on page 274:

“The delivery is sufficient and complete if from any or all of the circumstances the grantor has made known his intention irrevocably to part with his dominion and control over the *instrument*, to the end that it may presently vest title in another.”

In Ruiz v. Dow, 113 Cal. 490, the grantor, in order to avoid the delay necessitated by administration on his estate, executed a deed of his property in favor of his wife, the same containing the following recital:

“This deed is to be inclosed in an envelope and deposited for safe-keeping in the First National Bank of Santa Barbara, with an endorsement on said envelope directing that at my decease the then cashier or president of said bank shall, at the request of my said wife, immediately file this deed for record with the recorder of said county of Santa Barbara.

And I do hereby further declare as a part of this conveyance, and as my act and deed, that the filing of this deed for record, as above recited, at my decease, shall constitute and be a good, valid, and sufficient delivery of this deed to the grantee therein, as of the date of the execution thereof, as to all properties, both real and personal, belonging to me at the date of my decease.”

113 Cal. pp. 494-495.

The deed was first delivered to his wife, but on the advice of his attorney was delivered to the cashier of the bank mentioned therein, with instructions to deliver

and record on the grantor's death. The court held that the delivery was complete and that the title immediately passed.

Even though it should be true that *after the instruments had been unconditionally delivered to Ferguson* Mrs. Fensky told him to *sell the land*, if he could, at a profit, and that she would make it good to the particular grantee affected thereby, this suggestion was perfectly consistent with the previous unconditional delivery of the deed to Ferguson, for these reasons:

(a) The direction in question as to selling the *land* had no reference to *dominion over the deed*.

(b) The direction recognized the irrevocable nature of the *present interest of the grantees*, because if the previous delivery had not been regarded by Jeanette Fensky as being effectual immediately to convey title in remainder to them, there would have been no occasion for her to make anything good to the grantee.

(c) The direction was designed to promote the interests of the grantees as well as those of the grantor, and in view of their presence at the time it was given, it is clear that Jeanette Fensky was acting as spokesman for herself as life tenant and for her grantees as owners of the remainder.

(d) As the delivery of the deed was already complete, and Ferguson had become the trustee of an express trust, with duties which neither party could forbid or alter without the consent of the other, it follows

that Jeanette Fensky's suggestion to Ferguson to sell the land if he could at a profit, was, at most, unauthorized, void and immaterial. *Grilley v. Atkins*, 78 Conn. 380, 62 Atl. 337, and cases there cited.

The situation is analogous in principle to that where the *habendum* clause in a deed attempts to limit the extent of the estate previously set forth in the granting clause. In such a case the rule is universal that the granting clause is good, and the attempted subsequent limitation in the *habendum* clause is void and of no effect. 2 Blackstone, 298; 3 Washburn on Real Property (5th ed.), p. 390, Secs. 612, 613.

In *Smalley v. Smalley*, 24 Ohio Appellate Reports 353, the grantor attempted to reserve to himself "full power to sell and convey said premises the same as if this deed had not been executed." The court held the attempted reservation void and of no effect, as repugnant to the grant, which the grantor must have intended should be effective.

Action taken or declarations made by the grantor after delivery is complete are incompetent and inadmissible for the purpose of disparaging the grantor's deed already delivered.

Bury v. Young, 98 Cal. 446;

Ord v. Ord, 99 Cal. 524.

"And where the circumstances establish such a delivery as to constitute the deed a conveyance *in presenti*, evidence that the grantor afterwards executed other deeds purporting to convey the

same property, and that he also ordered the depository to restore the deed is incompetent for the purpose of showing what his intentions were in transferring the deed to the depository. Delivery to a third person with direction to record at the grantor's death has been held sufficient, with other circumstances, to sustain the deed. [Citing *Bury v. Young*, *supra*.] But not so where such direction is not accompanied by release of control over the instrument." [Citing *Renahan v. McAvoy*, 116 Md. 356, 38 L. R. A. (N. S.) 941.]

8 R. C. L. p. 998.

And again:

"* * * statements made by a grantor are inadmissible for the purpose of invalidating the deed where its delivery and acceptance has been established even though the parties have mistakenly supposed the legal effect would be different." [Citing numerous cases.]

8 R. C. L. 1003.

In *Hayden v. Easter*, 24 S. W. 626 (Ky.), the grantor executed a deed to his illegitimate daughter and delivered it to the depository to be kept until the grantor's death and then to be recorded. Subsequently the grantor conveyed a portion of the land therein described to another. In holding that the delivery was complete, the court says:

"It appears that the grantor, after the execution of the deed, sold and conveyed some 10 or 12 acres of the land to another; and this circumstance, it is thought, shows that he retained con-

trol and dominion over the deed during his life, for which reason, it is insisted, the grantor did not intend to divest himself of the title. Nevertheless, the fact remains that, even if he had the legal right, he did not recall it, or attempt to, and, on the contrary, indicated an intention to give other land or money in lieu of what had been sold."

In *Williams v. Evans*, 154 Ill. 98, 39 N. E. 698, it was held that the retention of dominion and control over the *property* covered by a deed delivered to the trustees thereof named as grantees, was perfectly consistent with a valid delivery of the *deed* sufficient to vest title in the trustees, the deed providing that the grantor should receive the rents during his life; the court further held that the *subsequent* declarations and acts of the grantor, and of the trustees named in the deed, could not defeat the trust.

In the case at bar there was, of course, no such provision *in the deed*, but the purpose of Jeanette Fensky was identical, that is to say, to retain the beneficial use of the property during her life and the possession and control thereof and yet to give a remainder to her grantees who should come into possession and enjoyment upon her death.

As illustrating the proposition for which we contend, namely, that it is the parting with the custody and control of the *instrument* delivered, and not of the *property* covered thereby, that is the test of a valid delivery, see *Kenney v. Parks*, 125 Cal. 146, where a

husband and wife, respectively, executed deeds the one in favor of the other and delivered them to a cashier of a bank with instructions that upon the death of either, the deed of the decedent should be recorded and the deed of the survivor returned to him (or her). The husband died and the widow sued to quiet title. It was held that no title passed to her under the husband's deed. The court cites and quotes *Bury v. Young*, 98 Cal. 446, and says, in part:

"The all-controlling fact in this case, which defeats plaintiff's claim, is that when the deeds were made and delivered to the cashier of the bank the respective grantors did not absolutely part with all future dominion and control over them, but, upon the contrary, the actual intention and understanding of each grantor was that upon the death of the other the survivor should take back his own deed, and that no title should vest under it. The decision in *Bury v. Young*, *supra*, was rested upon a directly contrary state of facts, namely, that the grantor had parted with the control and possession of his deed for all time."

125 Cal. 150-151.

In Ruling Case Law the rule is thus declared:

"The delivery of a deed to a third person in escrow is, generally speaking, sufficient if the grantor by his act of delivery loses all control over the instrument and by it the grantee is to become possessed of the estate."

10 R. C. L. 626 [citing *Shults v. Shults*, 159 Ill. 654, 50 Am. St. Rep. 188].

“While * * * the depositor’s right of possession may return if the specified event does not happen, or the conditions imposed are not performed, yet to constitute an instrument in escrow, it is essential that the deposit of it should be in the meantime irrevocable, that is, that when the instrument is placed in the hands of the depository, it should be intended to pass beyond the control of the depositor, and that he should actually part with all present or temporary right of possession and control over it.” (*Idem.*)

“Strictly speaking, * * * the depository is not an agent at all, but rather the trustee of an express trust with duties to perform for each of the parties and which neither can forbid without the consent of the other.”

10 R. C. L. 633 [citing *Seibel v. Higham*, 216 Mo. 121, 129 Am. St. Rep. 502].

Appellants are in error in stating that the case of *Stone v. Daily*, 58 Cal. Dec. 462, militates against the distinction we contend for. It was there pointed out that the test is whether the grantor has reserved *the power of control over the deed* as distinguished from the physical control over the deed. The test is, we submit, has the grantee in his instructions reserved the power of control over *the deed* as distinguished from control over the *lands*. We call the attention of this court to the concurring opinion of Chief Justice Angellotti, pointing out that had the finding of the trial court been that a valid delivery had been made,

there would have been sufficient evidence in the record to support it, and the language of the majority opinion:

“That afterwards, *no matter how shortly afterwards*, the parties changed their minds and sought to make another arrangement, as evidenced by the deposit with the bank, would make no difference. The transfer of title would have occurred, would have been a *fait accompli*, and could be undone only by a retransfer by Daily.” (58 Cal. Dec. 462, 464.)

THERE IS NO SHOWING THAT THE STEIN, CAMPBELL AND GEORGE FENSKY NOTES AND THE OTHER SMALL ITEMS OF PROPERTY REFERRED TO BY APPELLANTS WERE IMPROPERLY OMITTED FROM THE INVENTORY.

As before stated, appellants having urged that these notes belonged to the estate, the burden of proof was upon them.

Estate of Vance, 141 Cal. 624, 626;

As to the Campbell, Stein and George Fensky notes, we do not rely upon the letters addressed by Mrs. Fensky to Stein and Campbell. These letters are the only thing in the record which appellants can point to, to sustain their claim, the burden of proof of which is upon them, that said notes were *never given* and *delivered* by Mrs. Fensky to the various donees thereof. The various donees were in possession of these notes at the time of death, and therefore were presumptively the owners thereof. The letters are significant, although not essential to appellees' claims, as showing

that appellee Farnsworth was holding the notes as the agent of the donees. The letters do not purport to be, and were evidently not regarded by Mrs. Fensky as effectuating the gifts. They were simply letters to the parties named, and nothing more. In any event, the letters are not inconsistent with a valid gift, completed by physical delivery, at some other time before her death.

The only two references in the record to the alleged George Fensky note are first—a statement in a letter of appellee Merriam to the executor Campbell that George Fensky “seems to have been a little put out because of an effort to hold him to account for \$200 which was either *given* or loaned to him during Mrs. Fensky’s lifetime, to the extent of requiring him to give a hundred dollars of it to Charles” [Fensky] [Tr. p. 611], and second—his testimony that he did not “recall ever having a note that was executed by George Fensky to Mrs. Jeanette Fensky.” [Tr. p. 612.] The foregoing are not only entirely consistent with a valid gift, but indicate that such was the fact. Appellants have not established the burden of proof upon them, to show the contrary.

The item of \$800 claimed to have been omitted from the inventory was in joint names of Mrs. Fensky, Mrs. Schmidt and Mrs. Katzung [Tr. p. 548], and upon the death of Mrs. Fensky, passed to Mrs. Schmidt and Mrs. Katzung by right of survivorship, nor was it ever called to the attention of the administrator. [Tr. p. 549.]

As to the assignment of the Webster mortgage to appellees Katzung and Schmidt, it appears that this assignment was executed on the same date as the deeds referred to and delivered to Mr. Ferguson with instructions to hold it and to record it immediately upon the death of Mrs. Fensky. [Tr. pp. 511-512, 567, 623.] It is not claimed with reference to the assignment that there were any qualifications to these instructions. It is quite clear under the authorities cited showing the sufficiency of the delivery of the deeds, that the assignment of this mortgage was properly delivered, and did not belong to the estate of Jeanette Fensky.

Appellants Are Not Entitled to Any Relief Against Appellee Merriam.

Appellee Merriam was the administrator of the estate of Jeanette Fensky in California and was duly discharged on October 13, 1909, the court finding that he had "performed all the acts lawfully required of him as such administrator." [Tr. pp. 664, 665.]

The only relief *prayed for* against the appellee Merriam is that he "be required to account to these appellants for their distributive shares of the estate of said Jeanette Fensky which came into his hands and was by him distributed to said Wellke, Katzung and Schmidt". (Par. 5 of the prayer of bill of complaint.)

The money and personal property referred to having been turned over to the persons *therein* named, *under order of court*, to-wit, under the final decree of distribution in the estate of Jeanette Fensky, the appellee

Merriam is completely protected thereby. An officer of a court acting is protected by the court's order.

Tapscott v. Lyon, 103 Cal. 297, pp. 308, 312,
23 Ruling Case Law, p. 79;

Harris v. Starkey, 176 Mass. 445, 57 N. E. 698.

In fact, if Merriam had not complied with the order of court he would have been personally liable on his bond.

L. Harter Co. v. Geisel, 18 Cal. App. 282, 286:

"The heirs, devisees, legatees and creditors are of course interested in the disposition that the court may make of the funds found to be in the hands of the administrator, and if injuriously affected thereby may in proper time appeal from the order of the court disposing of the estate. If they do not do so, they are bound by the decree made by the court; and it necessarily becomes the duty of the administrator to dispose of the funds in his hands as directed by the order of the court.

"The disposition which the court might make of moneys in their hands belonging to the estate is immaterial to the administrators. All that they are concerned in upon a settlement of their account is to be credited with the various payments they have made, and to have the accounts settled according to the correct amount in their hands. Whatever disposition the court makes of this amount is no concern of theirs, and, if the parties interested therein make no objection to the order, they should be content." (Estate of Sarment, 123 Cal. 331 [55 Pac. 1015].)

He would likewise have been in contempt of court if he had not complied with the decree of distribution.

Wittmeier's Estate, 118 Cal. 255, 256.

Not being "a party aggrieved" by said decree, having no personal interest in the estate, he could not question the decree by appeal, or otherwise. *In re Williams Estate*, 122 Cal. 76.

Although there is nothing in the prayer of the bill of complaint asking for such relief, complainants, under paragraph XI of their brief, claim that the defendant Merriam in some way is liable to them for the value of the lands conveyed by Mrs. Fensky to the other defendants herein prior to her death. So far as we can make out from their brief, their theory is that appellee Merriam knew that such deeds were not delivered, as alleged, prior to Mrs. Fensky's death; that he knew of all the detailed facts set forth in their bill of complaint, which complainants claim entitle them to distribution of these lands, and that he wilfully, with intent to deceive complainants, omitted to inventory the lands covered by these deeds.

We submit that this question is not material in this case, *first*, because of the binding effect of the decree of distribution which distributes all the property of the estate of Jeanette Fensky whether described in the decree or not. [Tr. p. 664.] *Second*, because appellants were never heirs at law of the deceased. *Third*, it does not appear that there are any unadministered or undistributed assets belonging to the estate of Fer-

dinand Fensky. *Fourth*, under Griffith v. Godey, 113 U. S. 89, this court's jurisdiction as to property that in fact can be said to be "unadministered assets" exists, whether "*accidentally or fraudulently* withheld from the account. Therefore, whether the alleged withholding was fraudulent or not is of no consequence in this case.

In view, however, of the fact that Judge Merriam is one of the attorneys of record in this case for these appellees and in view of the vituperation and innuendo contained in appellants' brief, we cannot let such charges go unchallenged.

Judge Merriam testified as follows:

"No funds from the so-called Webster mortgage came into my hands while I was handling the estate, either as representative of the estate or as representative of any of the defendants. Every dollar that came into my hands as the administrator of the estate was deposited in that account and paid out by check." [Tr. p. 606.]

As to the notes in controversy, the record shows that after consultation with Mr. Campbell, the executor named in the will [Tr. p. 607], and questioning one of the donees of said notes [Tr. p. 451], they decided that these notes had been given to the donees by delivery. [Tr. pp. 606, 607.] The record further shows that the only persons who ever appeared as heirs in the estate did not question the validity of these gifts. [Tr. pp. 610, 613, 652.] The notes were treated throughout the administration as unquestioned valid

gifts [Tr. pp. 618, 619] and were paid by the persons obligated thereon upon that theory. [Tr. pp. 607, 618, 619.]

As to the joint bank account, it positively appears that this was not brought to the attention of Judge Merriam. [Tr. p. 549.]

As to the knowledge of Judge Merriam of the alleged non-delivery of the deeds executed by Mrs. Fensky in the fall of 1907, preceding her death in July, 1908, we submit, first, that if in fact Judge Merriam had been informed of all the facts and circumstances surrounding the delivery of those deeds, he would properly have come to the conclusion that the deeds were properly delivered and not a part of the estate of Jeanette Fensky for the reasons herein set forth.

However, the record does not show that Judge Merriam had any knowledge of the alleged non-delivery of said deeds. He specifically denied such knowledge. [Tr. pp. 606, 620.] There was a strenuous attempt made by counsel for appellants to show that the circumstances surrounding the delivery of these deeds were discussed between the various donees thereof in Judge Merriam's office soon after the death of Mrs. Fensky. Mrs. Farnsworth testified that no question ever arose about the delivery of the deeds until after Mrs. Fensky's death the parties took possession of the various properties deeded to them [Tr. p. 601] and that the discussion which arose then grew out of the dissatisfaction of some of the donees and a feeling that

they had been discriminated against. [Tr. p. 604.] She stated positively that there was no discussion in Judge Merriam's office as to whether or not the deeds executed by Mrs. Fensky had been validly delivered. [Tr. pp. 603, 624.]

The witness Ferguson testified that he did not remember having "any conversation with the defendant Merriam concerning the validity of the deeds." [Tr. p. 569.]

The statement of Judge Merriam that he was afraid of a contest with the Fensky heirs relied upon by appellants as showing knowledge of the alleged non-delivery of the deeds is conclusively answered by the only documentary evidence in the record, namely, a letter written by him to M. T. Campbell, the executor named in the will, in which he states that George and Charles Fensky were disappointed that a more liberal provision was not made for them and "there was a little talk of making some sort of a contest, a rumor that they were employing counsel and of *another will made previously to this one with different provisions.*" Judge Merriam said, in this letter, after referring to the rumors, "but I cannot myself see how they would have reasonable prospects of success in any sort of a contest." [Tr. p. 611.]

The witness Thompson, who testified that Judge Merriam expressed a doubt as to the validity of the deeds [Tr. p. 545] admitted on cross-examination that he felt very bitter and hostile toward Judge Merriam [Tr. pp. 551, 552], stating that "one hostility after

another adds venom—fuel to the fire.” It subsequently developed that this hostility grew out of the fact that Judge Merriam had disallowed a claim presented by Mr. Thompson for money alleged to have been loaned to Mrs. Fensky. That this claim was properly disallowed is shown by the fact that suit was never brought upon it. [Tr. pp. 550, 551, 553.] Furthermore, it subsequently developed that the doubt which the witness stated Judge Merriam had relating to the deeds, had to do with the mental competency of Mrs. Fensky to make the same [Tr. p. 554], she being in her last illness at the time. This agrees with Judge Merriam’s testimony [Tr. p. 620], although as before stated, he did not believe that they “would have any reasonable prospects of success.” [Tr. p. 611.]

If Judge Merriam ever believed, which he clearly did not, that these deeds were undelivered, it cannot be supposed that he would endanger his good name and character by failing to attack the same merely to accommodate the grantees named therein. His self-interest was in exactly the opposite direction, for if these properties were to be included in the administration proceedings, his fees as administrator would be greatly multiplied.

Appellants, at best, can claim only that there is a conflict in the evidence on this subject. We submit that the weight of the evidence is clearly against them. Furthermore, that the trial court having the opportunity of seeing the witnesses and observing their conduct upon the witness stand, was far more able to determine

the truth than is this court. The trial court determined the issue in Judge Merriam's favor, and all intentions and presumptions being in favor of the decision of the lower court (see cases already cited), we submit that such determination was *right*, and ought not to be disturbed.

The statement in appellants' brief (p. 179) that appellee Merriam "advised concealment of the property to deceive the appellants and their co-heirs," is not only without support in the evidence, and therefore extremely unfair to Judge Merriam, but it is conclusively refuted by the record. [Tr. pp. 556, 561, 541, 626.]

At most, even though the facts justified the application of such rule, which they certainly do not, the defendant Merriam can only be charged by persons *interested in the estate*, and then only with such assets of the estate as were lost to the estate through bad faith or through negligence. Neither has been proven.

Wheeler v. Bolton, 92 Cal. 159, at p. 171.

An administrator is not an insurer of the assets of an estate; neither does he warrant that the property inventoried constitutes all of the assets of the estate.

18 Cyc. 292, and cases cited.

Appellants Are Barred From Any Relief in this Court as Alleged Heirs of Jeanette Fensky, by Their Own Laches.

Of course, in view of the binding effect of the decree of distribution and what has already been said showing that appellants never were heirs-at-law of Mrs.

Fensky, and also in view of the failure of appellants to show that there are in fact any unadministered assets of the estate of Jeannette Fensky, they are not entitled to relief in any event. Assuming for the sake of argument, however, that they could overcome *all* of the foregoing obstacles (which they would have to do before they were entitled to any relief), still such relief would be barred by their own *laches*.

The federal courts have no probate jurisdiction. Any relief granted in the case of unadministered assets is granted by the court sitting as a court of equity. *Laches is a favored doctrine in courts of equity.* In *Naddo v. Bardon* (C. C. A., 8th Cir.), 51 Fed. 493, Mr. Justice Brewer said:

“No doctrine is so wholesome, when wisely administered, as that of laches. It prevents the resurrection of stale titles, and forbids the spying out from the records of ancient and abandoned rights. It requires of every owner that he take care of his property, and of every claimant that he make known his claims. It gives to the actual and longer possessor security, and induces and justifies him in all efforts to improve and make valuable the property he holds. It is a doctrine received with favor, because its proper application works out justice and equity, and often bars the holder of a mere technical right, which he has abandoned for years, from enforcing it when its enforcement will work large injury to many.”

It affirmatively appears by the admissions in the pleadings that appellants had knowledge of all the pro-

ceedings in the estate of Jeannette Fensky, and that they paid attention thereto and took copies of papers from time to time. [Tr. p. 27.] They therefore must have known, and did know, that the estate was being administered upon the theory that the brothers and sisters of the deceased,—her only surviving next of kin,—were also her only heirs at law. If the claims which they now assert are true, appellants would have been entitled to some proportionate part of the \$3500 inventoried in the estate and which the petition for final distribution prayed should be distributed to said next of kin; yet appellants failed to appear therein. The estate was distributed to the surviving next of kin as far back as September, 1909 [Tr. p. 663], and on October 13, 1909, the administrator of said estate was discharged. This suit was not commenced until July 8, 1914. [Tr. p. 33.]

The persons to whom the same was distributed have no doubt expended the same, and it would be highly inequitable to compel the administrator to account therefor after all these years, as appellants pray.

As to the property covered by the deeds, it does not appear but that the intervenor Charles Fensky and appellant Johanna Schutt (neither of whom testified) had knowledge of all the facts and circumstances upon which they now rely in their belated attack upon said deeds as far back as 1907 or 1908. Appellant Louisa Pickens testified that she had her first knowledge concerning the alleged non-delivery of the deeds in 1913; that she obtained such knowledge through her attorney

who investigated the estate in 1912. She stated: "I employed him to make the investigation." [Tr. p. 543.] We submit that there being no affirmative acts of concealment by any of appellees of the facts concerning the delivery of these deeds, that the showing made as to the manner in which such information was discovered, fails to comply with the rule laid down in *Wood v. Carpenter*, 101 U. S. 135, from which this court on the previous appeal (*Pickens v. Merriam*, 242 Fed. 363, 369), quoted as follows:

"In this class of cases the plaintiff is held to stringent rules of pleading and evidence, 'and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made.'"

242 Fed. 369.

This not being a case where appellant Louisa Pickens' lack of knowledge "has been produced by affirmative acts of the guilty party in concealing the facts from the other" (*Bailey v. Glover*, 88 U. S. 342, 348), under the decision of this court upon the previous appeal, the doctrine above quoted from the case of *Wood v. Carpenter*, *supra*, prevails.

It appears from the evidence that the grantees named in said deeds have since the death of Jeanette Fensky in 1908 taken possession thereof, made valuable improvements thereon, and expended thousands of dol-

lars for improvements, interest, taxes, street assessments, insurance, etc., besides paying off incumbrances; that some of the property has been sold. [Tr. pp. 733-738.] In view of these circumstances and these expenditures, it was certainly inequitable for the appellant Louisa Pickens, after sitting quietly by all these years, to commence suit, and make known her claims for the first time, *six years thereafter*. Not only has actual prejudice been shown to have been caused by the great delay in commencing this action, but the circumstances have been such that prejudice will be presumed.

McNeil v. McNeil, 170 Fed. 289, 291-292;

Kleinclaus v. Dutard, 147 Cal. 245, 249.

In the case last cited the supreme court of California said:

“Where the lapse of time in the assertion of the claim and the enforcement thereof, taken in connection with the circumstances disclosed are such as to show inexcusable delay on the part of the claimant, considerations of public policy, and the difficulty of doing entire justice obtain and are often sufficient to warrant a court of equity in declining, upon the ground of laches, to commence an investigation.”

147 Cal. 249.

Conclusion.

This case has been heard on its merits as to the issues of fraud charges, by three separate courts, to-

wit, the district court and the supreme court of Kansas, and by the United States district court for the southern district of California, and no one of these courts has been able to find any equity in appellants' case. It is a typical application of the statement set forth in the opinion of the circuit court of appeals, second circuit, in *DeLaske etc. Tire Co. v. United States Tire Co.* (1916), 235 Fed. 290, 292:

"This is a litigation aptly suggesting the truth that, while an appeal in equity brings up all the facts for review, there must come a time when the suitors' right to new investigations of complicated occurrences is properly limited to the indication of palpable error, and does not extend to discussion of matters about which all experience shows careful men may justly differ. Three courts have now arrived at the same conclusion in respect of the 'Goodrich use'; there is certainly evidence on which to base their findings; and, substantially the same evidential material having been used throughout, we regard the fact that the Goodrich Company did what has been so often found as having passed into the realm of settled things."

235 Fed. 292.

For the reasons herein stated and upon the authorities herein cited, these appellees respectfully submit that appellants are not entitled to any relief either upon the ground of fraud or as heirs at law of the estate of Jeanette Fensky; that there is no equity in

their case, and that the decree of the district court dismissing the action should be affirmed.

Respectfully submitted,

ROBERT B. MURPHEY,

JAY D. RINEHART,

J. H. MERRIAM,

HUNSAKER, BRITT & COSGROVE,

*Solicitors for Appellees J. H. Merriam, Eugene Wellke,
Alma J. Schmidt and Minnie S. Farnsworth.*

(NOTE.—The length of this brief is to be attributed to the voluminous record in the case containing about 800 pages, and the necessity of arguing the evidence upon a large number of issues of fact, and to the large number of legal questions involved in appellants' alleged cause of action.)

No. 3624.

IN THE
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Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Louisa Pickens et al.,

Appellants,

vs.

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Appellees.

Reply of Appellants to the Answer of Respondents to
the Petition of Appellants for Rehearing and Recon-
sideration.

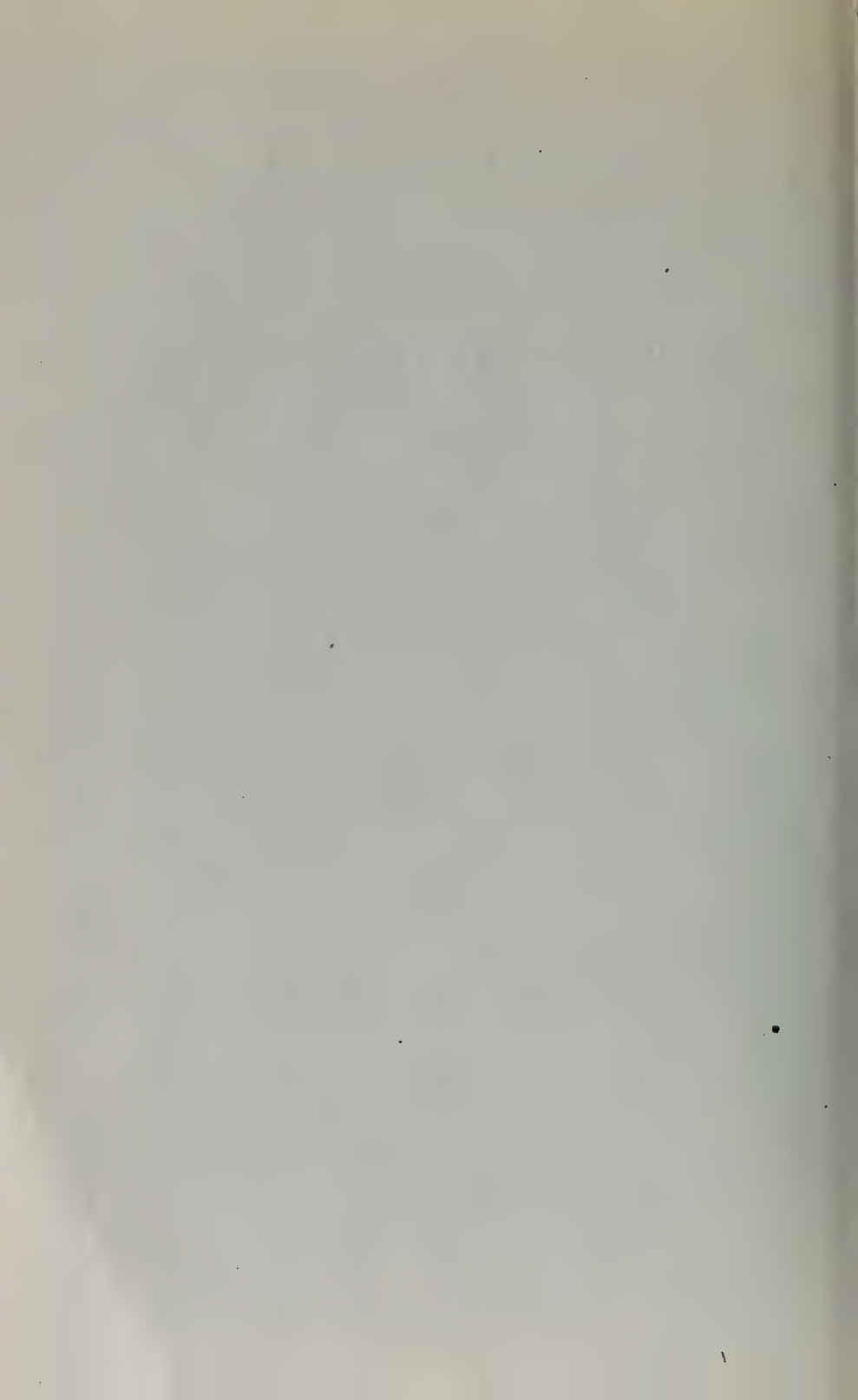
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FILED
JUL 11 1901



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Appellees.

**Reply of Appellants to the Answer of Respondents to
the Petition of Appellants for Rehearing and Recon-
sideration.**

The respondents have answered our petition for rehearing and reconsideration and they assert:

1. That the question of the ownership of the appellants of the property of the estate of Jeanette was not the main issue in the case, from which assertion and from the strenuous contention of respondents in their brief, they are compelled to admit that it *was an issue in the case*. We say that it was the main issue in the case but whether it was or was not the main issue yet it

was a *vital issue and necessary to be decided*. It was positively the main issue, too, because the ownership of the whole of the estate is of greater majesty and importance than the seeking of an imposition or impressment upon that estate of a constructive trust, and for only a part of said estate. Surely the absolute ownership of the whole of an estate is greater and of more importance as an issue in the case than any part or than any impressment of a trust upon only a part of it.

2. The respondents' next position is that the absolute silence of the court upon that issue of ownership must be considered as a decision of the court that appellants were not the owners. To this we reply that silence does not constitute a decision of the court and that there being no express decision of the court upon that question of ownership there certainly cannot be any implication of a decision arise by a complete abstaining from deciding it.

3. The respondents further answer that the court should decide this question of ownership and that it should decide it in favor of the respondents. This position is not easily reconcilable with those of the former two positions that they have taken, surely. They have nothing new to say upon the matter, but simply refer in this and in their other positions to what they have said in their brief, so it is but reiteration or referable to that, save, however, that they cite the case of Estate of Simonton, 59 Cal. Dec. p. 558, S. C.

190 Pac. Rep. 442. That case was cited by them to endeavor to impress upon the court that the absolute ownership of the appellants to these valuable properties of which they became the owners by descent from Jeanette was divested from the appellants by what they claim was a decree of distribution of the estate of Jeanette. To this position appellants reply that the case mentioned and cited as above is most excellent law from beginning to end, a very careful written decision by Judge Olney. That was a case wherein the Probate Court had before it for decision, upon the controversy, the very property over which the contention was had, and the question of heirship or ownership depended upon the solution of whether or not the property was community property of the pre-deceased spouse, and that court determined that it was not the community property, and awarded it to those to whom it should have gone by operation of law under the statute of descent. The decision, written by Judge Olney, distinctly stated that such a decree could not be held as having adjudicated upon any property of the estate which had been omitted by fraud or by mistake, and it further said that, in order that the blood relatives of the pre-deceased spouse could inherit, there was necessary to be shown not only such blood relationship of that pre-deceased spouse but also *plus* the further fact that it was the community or separate property of the pre-deceased spouse at his death, and that it had come by descent from such spouse to the deceased widow or widower as the case might be.

We therefore see that, in accordance with the above decision and also in accordance with the decision of this very court of appeals in this very case reported in the 242nd Federal Reporter, page 363, these properties which were concealed and excluded from all administrative proceedings (whether by fraud, accident or mistake excluded) form no part of any property that was possible to have been adjudicated upon in the probate proceeding of any kind. Moreover, this whole case teems with incontrovertible obstacles to any other view. That is, it was not before the court for either actual or constructive adjudication. Still further, the instruments signed by Jeanette as to the lands, and the subsequent records of them after her death, presented an apparently valid title in the respective purported grantees, and notwithstanding that the administrator of her estate and the other defendants knew of the circumstances which rendered these deeds absolutely worthless because of non-delivery, yet this court knows that the appellants had no knowledge of that fact and that they had a right to rest upon the belief that they were absolutely valid deeds, from their mere appearance, and this court knows that the appellants obtained no knowledge or information of their absolute worthlessness or their grounds for considering them such until 1914 or shortly before the commencement of this suit, and consequently they could not be chargeable with constructive necessity of appearing at Probate Court on something in the shape of property that was never treated as any part of the

estate and as to which they had no knowledge at the time that it formed part of said estate, being concealed in the manner indicated. Furthermore, the Probate Court could not possibly have passed upon the question of ownership by heirship as to any of these lands and properties so concealed unless it had investigated the facts and had determined thereon and had adjudicated as to whether or not those particular properties were the properties or the fruits or proceeds of the properties that belonged to Ferdinand at his death, as his separate estate, and had passed by descent to Jeanette, for without the proof of adjudication of that *plus* element so stated by Judge Olney, in the above case cited, there could have been no adjudication with respect to the particular property.

In the case at bar, the appellants have proven that all the property that belonged to Jeanette at the time of her death was the very separate property or the fruits or proceeds of the very separate property which constituted the estate of Ferdinand, her pre-deceased husband, at the time of his death, and that it passed by descent to her from him, and it has been conclusively proven and is admitted by respondents that the appellants are the blood relatives of Ferdinand, as stated in the complaint.

Furthermore, as already argued, the Probate Court had no jurisdiction even to make a decree of distribution of the small amount of personal property on which it passed.

This court has, in its decision, already stated in its recital of facts, that these questions are *issues in the case* and has referred to portions of the record which substantiate such statement.

Whether or not this reply to the answer of respondents is rutable, it certainly is as much so as is the answer of the respondents and we will assume that counsel for the respective parties are not amenable to reprimand for this prolonging of discussion.

Respectfully submitted,

FRANCIS G. BURKE,

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No. 3624.

IN THE
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PETITION FOR REHEARING.

*To the Honorable, the Judges of the United States
Circuit Court of Appeals, for the Ninth Circuit:*

The appellants respectfully and earnestly petition this Honorable Court for a rehearing and reconsideration of certain questions and points in issue in this cause, the most important and vital embraced in the issues therein, and which should be determined and which have not in any way been passed upon, determined or adjudicated, and without a determination thereof this cause has not been decided upon its most material features and issues, which are as follows:

FIRST.

Whether or not the appellants and their co-heirs of Ferdinand Fensky became and were the heirs and only heirs of Jeanette Fensky, who died intestate as to her property in California, and as to whether or not they inherited from her whatever estate she left in California at the time of her death and that they thereby became and were the owners of such estate, which included the real estate and notes and other property hereinafter mentioned.

SECOND.

Whether or not Jeanette Fensky became and was the absolute owner of a large amount of real property and also of considerable personal property in California, all of which came to her by descent from Ferdinand Fensky and was his separate property at the time of his death and comprised the whole of her estate in California, and that the greater portion of it consisted of real estate of which she executed instruments in 1907 purporting to convey the same to her blood relatives, defendants in this action, but that said instruments were not delivered and were absolutely void and of no effect whatever. That she also wrote certain letters expressing her desire that certain promissory notes belonging to her should be given to certain of the same blood relatives at her death, but that none of said notes were delivered, and such attempted gifts *causa mortis* were void and of no effect and that said real estate and notes belonged to Jeanette at

her death and that none of said real estate or of said notes were ever included in but were absolutely excluded and concealed from any proceedings of administration of her estate and were not in any way treated as part of her estate by any or either of the defendants, and that such properties and also other property of her estate was diverted entirely from any such administration proceedings, and were wholly unaccounted for. That the claims of title of the defendants as purported grantees under the instruments above mentioned to the real estate described therein are invalid, and that their claims are clouds upon the title of appellants, who are the owners as heirs of Jeanette, and that the claims also under the alleged gifts *causa mortis* are also invalid and that appellants should be adjudged such owners and entitled to removal of the clouds and to an accounting from the defendants in the premises.

That these questions are actually and undeniably presented for determination as of the chiefest and most important of all questions, the record clearly shows. The complaint, on pages 18 to 20 transcript, defines the lands purported to be conveyed in the instruments; and on pages 23 and 24 the fact that the instruments and notes were not delivered and that the instruments and attempted gifts were void, and on page 25 the fact of title by descent to the appellants and their co-heirs, and the prayer of the complaint in subdivision three is that an account be taken of the property in

the estate of Jeanette and appellants be declared the owners, and in subdivision four of the prayer that the defendants have no interest in the property, and in subdivision five that Merriam also account for the estate, and on page 29 of the transcript the prayer for general relief. In the amended complaint, see transcript pages 191 to 194; in the intervention complaint, pages 104 to 111, and in the prayer in intervention, pages 112 and 113, and in the answer of defendants, pages 47 to 53, and 121 to 126, and in the assignments of errors, pages 222 to 238, including assignments Nos. 50 and 52 on page 234, also assignments Nos. 72 and 73 on page 241, and Nos. 75 and 76 on page 242, and Nos. 79 to 82 on page 243. On the subject of gifts *causa mortis*, with authorities and appropriate references to transcript, see pages 170 to 174, appellants' brief, and upon Merriam's exclusion from administration of these lands and other concealed assets of estate of Jeanette, see pages 174 to 185 of said brief, with appropriate references to transcript and with authorities in said appellants' brief. Moreover, express recognition was announced in the former appeal of the alleged rights of appellants in this case as reported in 242 Fed. Rep. 363, upon the omitted subject matters herein discussed, and it was there distinctly announced in favor of appellants, as the law of this case to be followed thereafter to its end, to the effect that if the allegations of the complaint with respect to the relationship of appellants to the estate of Jeanette as such heirs were true, and the alleged instruments, so-called

deeds signed by Jeanette, and the alleged gifts *causa mortis* were not delivered, the appellants, on proof of such facts, would be entitled to a decree in their favor that they were the owners of said land and property and were entitled to an accounting in the premises. Furthermore, defendants in their brief, and also in their oral argument, in response to the oral argument of appellants upon that matter, recognized and argued and agreed with appellants that these matters were vital in the case to be determined, and they attempted in their brief to controvert the propositions of law involved, as presented by appellants, upon those matters. Fully one-half of their brief is an attempted refutation of the facts and law upon these very questions, which have not been determined by this Honorable Court.

In this connection we call the attention of the court to the following equity rules. These rules, however, express the well-known general rule prevailing in a court of equity, but, as such rules they have the effect of law to govern the case:

“Equity Rule 23. ‘MATTERS ORDINARILY DETERMINABLE AT LAW, WHEN ARISING IN SUIT IN EQUITY TO BE DISPOSED OF THEREIN. If in a suit in equity a matter *ordinarily determinable at law* arises, such matter *shall be determined in that suit* according to the principles applicable, without sending the case or question to the law side of the court.’ ”

“Rule 72. CORRECTION OF CLERICAL MISTAKES IN ORDERS AND DECREES. (Clerical mistakes in decrees or decretal orders, or errors arising *from any accidental slip or omission*, may, at any time before *the close of the terms at which final decree is rendered*, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of rehearing.) (85 Rose’s Code, #1092.)”

This court has already decided, and very properly so, that whatever property Jeanette owned came to her by descent from Ferdinand, and such property embraced not only all the property that came by descent from him directly to herself, but also the remainder of his estate which descended direct to the appellants and their co-blood heirs from Ferdinand and which they quit-claimed their interest in said estate of Ferdinand to Jeanette, for it is apparent that the record shows she paid the moneys, which she derived by direct descent to her from Ferdinand, to the purchase of those interests embodied in those quitclaims and consequently those interests were the fruits and investments of that which came to her originally by such descent, and are, of course, to be considered as though those interests had come direct to her from Ferdinand by descent, in like manner as though it had been other and different property in which she had invested the money, and which property, of course, would still retain the characteristics of property coming to her by descent from Ferdinand direct to her.

Therefore, all the property that she had came to her by such descent from Ferdinand, as this court has properly decided.

Such being the case, the law of descent in California at the time of her death is clear and explicit and establishes as correct the contention of appellants that all of this property which came so by descent to Jeanette passed instantly at her death by descent from HER and from HER ONLY to these appellants and their co-blood heirs and they became thereupon instantly the absolute owners of it, inasmuch as originally the property which so descended to Jeanette *was the separate property of Ferdinand when he died*. This is by the provisions of 1386 Civil Code, subdivision 8 (see page 151, brief of appellants). This title of appellants was and is as absolute as though these appellants had been the children of Jeanette and had taken by direct descent from her as her children; therefore these appellants are the owners in fee simple of those lands. There is no possible escape from that conviction. Upon this question see pages 148 to 154, appellants' brief. Bear in mind that "*Successions to estates is purely a matter of statutory regulation which cannot be changed by court,*" as held in Estate of Nigro, 172 Cal. 477.

From the fact that this court in its opinion has incidentally stated that it did not concern the appellants as to what Jeanette did with her property, it is pure matter of conjecture on our part as to *why* it did not concern the appellants, according to the opinion of the court, unless that opinion was based upon an as-

sumption that the quitclaims made by the appellants several years before the death of Jeanette, of their interest in the estate of Ferdinand (those quitclaims being sustained by the court), should be construed as extending to and embracing the interests of appellants in the estate of Jeanette, as though they had been derived by them by descent as his heirs and as by descent from him and not as by descent from her (Jeanette). We can only surmise that possibly *that* was the assumption of the court, as being based upon the characteristics of the property of the estate of Jeanette as having been originally in the estate of Ferdinand, as to certain of it and as to the remainder, the fruits thereof. Of course, if this was the assumption of the court it was an erroneous one because the inheritance and heirship of the appellants to the estate of Jeanette was from HER and HER ONLY, and those quitclaims had no relation to such inheritance, and inasmuch as she had a right to do as she pleased with her own property and, as appellants contend, that she did nothing with it, but that on the contrary all of her attempts to do anything with it in the way of transfer by the purported deeds and the purported gifts *causa mortis*, because of non-delivery, were absolutely void and of no effect whatever, it necessarily follows that she died the owner of these properties and that the appellants were HER heirs and HER HEIRS ONLY and INHERITED that property from HER ONLY. See Estate of Watts, 179 Cal. page 23, where we give a quotation from it, subdivision 8 of section 1386, Civil Code.

“That subdivision is as much a part of the law of descent as any other, and those who inherit under it TAKE AS HEIRS OF THE DECEDENT WIDOW OR WIDOWER, NOT as heirs of the pre-deceased spouse.”

To the same effect the

Estate of Hill, 179 Cal. 683.

See also the other cases on the succession to property on pages 148-154, appellants' brief.

The instruments, so-called purported deeds, were certainly not delivered, and were absolutely void and of no effect. They embraced nearly the whole of the property, in point of value, of the estate of Jeanette, and certainly exceed fifty thousand dollars in value, and, as they were absolutely void, those properties certainly formed a part of her estate at the time of her death and passed to these appellants and their co-blood heirs, and they became the owners thereof.

It is well and proper at this juncture to inquire and consider into the situation of appellants when they brought this action, they having then for the first time acquired information of the possible means of proof of the non-delivery and voidness of those alleged deeds. They knew that whatever they could recover by an action must necessarily be from and of the estate of Jeanette, and they believed and had a right to believe, and as the law ordained, that if they could succeed in proving that the instruments were not delivered, that

of course the lands formed part of her estate and the major part, and that they became the owners by descent and inheritance from her and the owners, in such a case, but the uncertainty of being able to prove it, which if they could succeed in proving, would give them absolute title to all of her estate, actuated them at that time in the bringing of this action, not only to seek to be declared the owners by descent from her of these lands and of the personal property, but also to seek to impress upon the estate of Jeanette the constructive trust arising out of the setting aside of the quitclaims of the interest in the Ferdinand estate, and so as to impress that trust upon the estate of Jeanette and upon those lands included in those purported deeds which were claimed to be void for non-delivery, and upon those gifts *causa mortis*, void for the same reason, and upon other property of her estate not accounted for, in the event that upon the trial of the action the appellants should unfortunately fail in proving the non-delivery of the purported deeds and the non-delivery of the gifts *causa mortis*, or that for some reason the law might possibly and unexpectedly be declared as though they had not become the heirs of Jeanette as they contended they were. That is the only reason why this action included the attempt to impose this constructive trust; namely, to impose it upon the estate of Jeanette if it should so result that for lack of proof on the trial the appellants failed to become the successors of her estate, including the property in the purported deeds, which embraced nearly

the whole value of the estate; for it is evident that it would have been ridiculous to obtain a setting aside of the quitclaims and thus to successfully impose a constructive trust in their own favor upon their own property of which they became the absolute owners by descent from Jeanette, a result which would be simply farcical, and nothing less than that. So, insofar as that constructive trust is concerned, if it had been imposed and the quitclaims set aside, it would have been of no consequence and of no effect whatever, if this court had decided the main questions in the case which involved the question of descent from Jeanette to appellants, the non-delivery and voidness of the instruments and gifts mentioned, and had determined that appellants were the owners of these properties by descent from Jeanette, inasmuch that the trust thus imposed in favor of appellants would have been imposed upon their own property. Quite otherwise would have been the effect of setting aside the quitclaims and imposing the constructive trust if the court had decided that the instruments (the purported deeds signed by Jeanette) were delivered and were valid, and the so-called gifts *causa mortis* were delivered and were valid, or that appellants were not the heirs of Jeanette, for in that case the trust would have been imposed on the property of others and not on the property of appellants, so we see the seeking of an imposition of this constructive trust was, under the circumstances, a justifiable measure of precaution on the part of appellants to seek to have the imposition of it on the prop-

erty of others if, unfortunately and unexpectedly, because of a lack of proof upon the trial, the appellants had failed to prove and establish their ownership of that property. It is perfectly right to contemplate the position of the complainants held at the outset of this action, and hence we see that where the appellants have established their title and ownership to all of the property of Jeanette, including the real estate mentioned, the question as to whether or not the quitclaims in the Ferdinand estate were void and should be set aside and the trust imposed is of no consequence whatever one way or the other, for it could neither add to nor detract from the title and ownership of appellants, as heirs of Jeanette. It is a mere minor question in the case, and whilst much space was absorbed in the record with respect to the setting aside of the quitclaims, it only became necessary in that respect because of the mass of the correspondence and evidence on the subject, but disproportionate to the length of the record on that subject is the insignificance of the subject itself, as the court will see, and yet it has monopolized the attention and decision of the court and has been treated by the court in such a way as to exclude entirely the main question of ownership.

Now, one of the main questions is, what estate did Jeanette leave at her death of which she was the absolute owner, and which during her lifetime she obtained by descent from Ferdinand of his separate property either in kind or as fruits thereof; for those are the

properties of which the appellants and their co-blood heirs became the owners and are now the owners as her heirs, the major portion of which are the lands included in those purported deeds which are absolutely null because not delivered? With regard to them the appellants were indeed fortunate to be able to prove and did prove conclusively that they were not delivered, that although signed by her and acknowledged before Mr. Parmele, as notary, in the presence of her real estate agent, Ferguson, yet that she contemporaneously directed the latter to sell the property described in the papers, to handle it just as if the papers had not been given, and to record the instruments of such property *as she owned or might own at the time of her death*, and meanwhile to continue to control and have charge of the property. That afterwards she sold one of the properties through that same agent and made a deed to the purchaser. These instructions positively show that she *retained the power to sell any or all of the property; to recall the instruments, any or all, into her own manual possession at any moment; to control at all times the efficacy of the instruments*, and that she did exercise that power as to one instrument, and that her instructions were those which indicated that *none* of the instruments were to take effect whatever in any event except as to her property *which she might own or which she did own at the time of her death, and as to those, only to take effect at her death*. Now, it is very evident that any property which she owned at the time of her death would have to go by descent or by

will and could not go by deeds, and notwithstanding that she evidently construed these instruments as that they might be efficacious like unto her will, yet her mistaken ideas as to their legal effect as such could not give any legal effect to them or any different effect than what the law gives their legal effect, if any, which was simply that they were absolutely void and of no effect. It is needless to exhaust time upon a subject so clear as this. Parmele was the notary. He was entirely disinterested; his evidence is clear, as shown upon pages 155 to 157 in the argument or brief of appellant, and in pages 510 to 516 of the transcript. The only other evidence was that of Ferguson, the real estate agent, on pages 565 to 567 of the transcript. He was merely the bailee of Jeanette and solely the agent of Jeanette, and his manual possession was her possession also, and his evidence confirms that of Parmele; the only other evidence was Minnie Farnsworth, on page 623 of the transcript, and all she testified was that she did not hear the instructions that the other two witnesses mentioned testified were positively and clearly given, as hereinabove stated and as shown in the transcript, and as embraced in the argument supported by authorities in the appellants' brief, pages 154 to 164, and we here particularly call the attention of the court, among the other authorities, to the case of *Stone v. Daily*, 58 Cal. Decs. 462-468, as shown on page 161 of that brief, which decides that where the right or power to recall the instrument or to control its efficacy existing, is not a delivery, and the

case of Williams v. Kidd, 170 Cal. 631, 637, on page 158 of that brief. There was no contrariety in the evidence upon the non-delivery of those instruments, no question of fact at variance. It is therefore simply a question of law upon the evidence or fact which is established that there was no delivery, and that the instruments were absolutely null.

And now what we have said with respect to these worthless so-called deeds is equally applicable to the alleged gifts *causa mortis* of the Stein and Campbell notes, which were not delivered, and the authorities upon this question will be found in pages 165 to 174 of the appellants' brief.

So, may it please the court, according to our view, the all-important questions of the case, as hereinabove set forth, have been left undetermined, and only one question, and that of minor importance, has been passed upon in the decision, and we here have endeavored to so present our views as that this court will appreciate the situation and accord the rehearing and reconsideration prayed for and will determine these questions left undecided, for if those so-called deeds are void for non-delivery, or those so-called gifts *causa mortis* are void for non-delivery, the appellants having inherited all the property of Jeanette, and those properties being her property at her death, it follows that the appellants are the owners of it, and the owners by a NEW AND INDEPENDENT TITLE AS OF THE DATE OF THE DEATH OF JEANETTE, entirely and utterly free from

the effect of any quitclaims of their interest in the estate of Ferdinand, to an absolute certainty.

The decision in *Pickens v. Merriam* in this cause, in 242 Fed. Rep. 363, has already established the law of the case that these properties, excluded and concealed from any administration proceedings, should be accounted for by the defendants. See upon this question of accounting, with authorities, pages 222 to 228, appellants' brief, and on pages 210 to 216, same brief. Even as to the small amount of property involved in the attempted accounting and attempted distribution of the estate of Jeanette, that proceeding was void for want of jurisdiction, although the amount is very small and hardly worth mentioning. See pages 193 to 210, appellants' brief.

If appellants had brought their action based solely upon their ownership as heirs of Jeanette, confined solely to that and for the purpose of recovering the property of her estate, it is certain that the cause could not have been decided unless the court had specifically determined such ownership question, nor, in such case, would a bare statement in the opinion or decision suffice which was confined to a recital that inasmuch as Jeanette had a right to do as she wished with her own property and that it did not concern the complainants what she did with it, unless in the decision reasons for such statement were given and thereby deciding whether or not she did transfer the property or whether or not she was the owner of it at the time of her death and formed part of her estate, and whether

or not the complainants inherited such property from her and became the owner thereof. These remarks are equally applicable to the case at bar, for it is certain that the mere incorporation in this action of the seeking to set aside those quitclaims of the interests in estate of Ferdinand and of the imposition of such constructive trust on the estate of Jeanette did not deprive complainants of their right to determination of such ownership. There was no misjoinder of causes of action in the suit at bar, but, on the contrary, it is an equity case, which requires a full decision on all matters, and it is also certain that appellants are here with clean hands and are entitled to the specific determination of the questions thus omitted and undecided, and, as we contend, are entitled to a decree in their favor as owners of the land and other property mentioned, and to an accounting.

Of course, as this court has properly decided, the lands and notes and other property belonged to Jeanette absolutely as her own property, to do with as she saw fit, but the fact is that she did nothing with them and that her attempts to transfer them to the defendants, her own blood relatives, by gifts, through the worthless non-delivered so-called deeds and alleged gifts *causa mortis*, were absolutely of no effect whatever, and hence these lands and other property belonged to her as her absolute property at the time of her death, and she left no will, and consequently it is positively certain that they passed instantly at her death to the appellants and their co-heirs in absolute

title and ownership, derived by inheritance from her, *and it is manifest that it is of vital concern to these appellants, being such owners, that the invalid and worthless claims of the defendants be declared void and that appellants be adjudged the owners of those lands and property*, and we feel confident that the court, upon this reconsideration, will decide such ownership to be in the appellants and that it will afford the appropriate equitable relief sought by them, by removal of the clouds and by directing an accounting to be had.

The omission to decide these questions presents a case of peculiar gravity and of general importance.

And now, with these remarks, appellants invoke a decision upon the above matters mentioned and respectfully submit this to the careful consideration of Your Honors, and ask for a reversal of the decision and judgment heretofore given.

FRANCIS G. BURKE,

Counsel for Appellants.

916 Trust & Savings Bldg.,

Los Angeles, Cal.

I, Francis G. Burke, do hereby certify that I am counsel for appellants in the foregoing entitled cause, and that in my judgment as such counsel, the foregoing petition for rehearing is well founded and that it is not interposed for delay.

FRANCIS G. BURKE,

Counsel for Appellants.

No. 3624.

IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Louisa Pickens et al.,

Appellants,

vs.

J. H. Merriam et al.,

Appellees.

ANSWER TO PETITION FOR REHEARING.

ROBERT B. MURPHEY,
JAY D. RINEHART,
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1132 Title Ins. Bldg., Los Angeles, Cal.

PARKER & STONE Co., Law Printers, 232 New High St., Los Angeles, Cal.

FILED
JUL 11 1911
P. D. MONTGOMERY

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ANSWER TO PETITION FOR REHEARING.

Although the rules do not provide for an answer to a petition for a rehearing, appellees invite the consideration of the court to the following short memorandum, and respectfully submit that the petition for a rehearing filed by the appellants herein is without merit and should be denied.

The correctness of the decision of this court upon the main issues presented by this case is not questioned by the appellants to the slightest extent; in fact, on page 19 of their petition they concede it to be correct.

Their petition for a rehearing is based solely upon the *assumption* that this court did not pass upon the claims of appellants as alleged heirs-at-law of

Jeanette Fensky. Appellees believe that appellants are mistaken in this assumption. Such claims were fully presented by appellants in their brief, and were completely answered and shown to be wholly without merit by appellees in their brief (pp. 135-196).

In appellees' brief we pointed out: *First*,—that any claim of appellants as alleged heirs of Jeanette Fensky was barred by the decree of distribution of her estate entered September 22, 1909. (See pages 135-160 of appellees' brief.) *Second*,—that even though this obstacle could be overcome, appellants are not and never were heirs of Jeanette Fensky as to any of her property under the provisions of subdivision 8 of section 1386 of the Civil Code of California (see pages 160-166 of appellees' brief; see also the very recent case of Estate of Simonton, 59 Cal. Dec. [advance sheets] 588, 190 Pac. 442); *Third*,—that even if the foregoing barriers were removed, in any event there were no unadministered assets of the estate of Jeanette Fensky in which appellants would be entitled to share, because Jeanette Fensky, during her lifetime, transferred to the appellees (other than appellee J. H. Merriam) the property, as to which appellants claim to be her heirs, and the same therefore was not a part of her estate at the time of her death (see pages 167-184 of appellees' brief); *Fourth*,—that any relief which appellants might otherwise have been entitled to was barred by their own *laches* in failing to seek relief for the period elapsing since the decree of distribution of the estate of Jeanette Fensky on September 22, 1909. (See

pages 191-196 of appellees' brief.) Each one of these four propositions defeated their claims as alleged heirs of Jeanette Fensky. Hence, this court was abundantly justified in saying in the last paragraph of its opinion that it was "of no concern of the Ferdinand Fensky heirs" what Jeanette Fensky "might be pleased to do" with her estate.

Furthermore, this court in affirming the judgment of the court below, necessarily held that the claims of appellants were wholly without merit, and that there was no equity in their case. It can hardly be possible that the claims of appellants as alleged heirs of Jeanette Fensky, to which the latter third of each of the briefs on file was devoted, and which were also argued pro and con at the oral argument, were not considered and ruled upon by this court against appellants.

It is true that the bulk of the opinion of this court is devoted to a detailed discussion of the claims of appellants based upon the alleged fraud of Jeanette Fensky (the predecessor in interest of appellees) in procuring assignments of appellants' interest in the estate of Ferdinand Fensky, the deceased husband of Jeanette Fensky, but this, no doubt, was due to the fact that appellants themselves have always heretofore regarded such alleged fraud as the principal foundation of their action and have treated their claims as alleged heirs-at-law of Jeanette Fensky as of secondary and minor importance, in which they had little faith, and no hope of success. A mere reading of their

amended bill of complaint points clearly to the conclusion that the fraud alleged is the *gravamen* of their action. Appellants are in no position, therefore, to complain that this court in its opinion likewise treated their alleged cause of action on the ground of fraud as the principal point in the case.

The claims of appellants as heirs-at-law of Jeanette Fensky are so obviously without any merit that, if it be possible that such claims have not already been considered and passed upon by this court when it *affirmed* the judgment of the lower court, they may be quite easily passed upon in denying the petition for a rehearing.

For each of the reasons herein stated, any one of which is sufficient in itself, appellees respectfully submit that all of the issues presented by the briefs and at the oral argument have been correctly determined by this court; that appellants are not entitled to any relief, either upon the ground of fraud or as alleged heirs-at-law of Jeanette Fensky; that there is no equity in their case; and, consequently, that their petition for a rehearing should be denied.

Respectfully submitted,

ROBERT B. MURPHEY,

JAY D. RINEHART,

J. H. MERRIAM,

HUNSAKER, BRITT & COSGROVE,

Solicitors for Appellees J. H. Merriam, Eugene Wellke, Alma J. Schmidt and Minnie S. Farnsworth.

5

United States
Circuit Court of Appeals
For the Ninth Circuit.

JULIA MOSHER COLLINS, WILLIAM B.
LOUNT, and HATTIE L. MOSHER,
Appellants,
vs.
CITY OF PHOENIX, a Municipal Corporation,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the District of Arizona.

FILED
AUG 11 1920
F. O. MONCKTON,
CLERK

United States
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JULIA MOSHER COLLINS, WILLIAM B.
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JAMES E. NELSON, Esq., Phoenix, Ariz.,
Solicitors for the Appellee.

In the District Court of the United States in and for
the District of Arizona.

No. —.

JULIA MOSHER COLLINS, WILLIAM B.
LOUNT, HATTIE L. MOSHER,
Plaintiffs,

vs.

CITY OF PHOENIX, a Municipal Corporation,
Defendant.

Application for Writ of Prohibition.

To the Honorable, the District Court of the United
States in and for the District of Arizona, and to
the Honorable WILLIAM H. SAWTELLE,
Judge Thereof.

Now come the plaintiffs, Julia Mosher Collins,
William B. Lount and Hattie L. Mosher, and move
this Court to make an order and to cause to be issued
out of, and under the seal of this court an alternative
writ of prohibition restraining and prohibiting the
defendant from proceeding under, or doing any act
or thing in pursuance of Resolution No. 380 of the
City of Phoenix with respect to the property of the

plaintiffs herein; that upon the service of this writ no further proceedings shall be had by said city under said resolution; and that the defendant named in said writ refrain from doing any act or thing and from trespassing or entering upon the property of the plaintiffs herein, or to show cause before this Court at a time and place to be specified in said writ why the defendant named in said writ and in this application should not be restrained and prohibited from any further proceeding in said action and matter.

Said application is made upon the grounds, and for the reasons, set forth in the affidavit annexed hereto, that the defendant, the City of Phoenix, has no jurisdiction to proceed in said matter.

J. B. WOODWARD,

Attorney for Plaintiffs. [1*]

[Endorsements]: In the District Court of the United States in and for the District of Arizona. Julia Mosher Collins, William B. Lount, and Hattie L. Mosher, Plaintiffs, vs. City of Phoenix, a Municipal Corporation, Defendant. Application for Writ of Prohibition. Filed Nov. 3, 1919. Mose Drachman, Clerk. By Nat. T. McKee, Deputy, [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States in and for
the District of Arizona.

No. —.

JULIA MOSHER COLLINS, WILLIAM B.
LOUNT, HATTIE L. MOSHER,
Plaintiffs,

vs.

CITY OF PHOENIX, a Municipal Corporation.
Defendant.

Affidavit of Applicant for Writ of Prohibition.

State of Arizona,
County of Maricopa,—ss.

Hattie L. Mosher, being first duly sworn, on oath
deposes and says:

I.

That this affidavit of applicant for writ of prohibition is made by affiant for herself and on behalf of her coplaintiffs, and the facts therein set forth are within the knowledge of affiant.

II.

That the defendant, the City of Phoenix, is a municipal corporation, created, organized, operating and existing as such under the provisions of Article XIII of the Constitution of the State of Arizona, and under the laws thereof relative to such organization of cities having a population of more than 3,500 people, and such cities reserving to themselves certain rights, is in effect within its corporate boundaries, an independent sovereignty bearing to this State a

similar relation to that which this State bears to the Federal Government, its Charter having by the initiative and referendum law of the State been adopted by the people of the City of Phoenix. [3]

III.

That plaintiff, Julia Mosher Collins, is a resident and citizen of the City of Portland, County of Multnomah, State of Oregon;

And that plaintiff, William B. Lount, is a resident and domiciled in the County of Alameda, State of California;

And deponent Hattie L. Mosher is a resident and citizen of the City of Phoenix, County of Maricopa, and State of Arizona.

That for upward of forty-eight years, plaintiffs or their predecessors in interest, have been, and now are, the owners in fee, and in possession of the following described real estate, namely:

A strip of land 33 feet wide, of the value of \$35,000, extending from the east side of Center Street (according to the old town-site map of Phoenix, recorded in the office of the County Recorder of Maricopa County, State of Arizona, in Book One (1) of Maps at page Five (5), and running thence east 704 feet along the North side of the Section line between Sections 8 and 5, Township 1 North, Range 3 East, Gila and Salt River Base and Meridian in Maricopa County, Arizona, to a point; thence North 33 feet to a point; thence West 704 feet to a point; thence South 33 feet to the place of beginning.

IV.

That the original town site of Phoenix was located

on the North half of said Section 8, and the North boundary line between said Sections 5 and 8, and that the predecessors in interest of plaintiffs subsequently received patent to the same, as recorded in the office of the Recorder of Deeds of Maricopa County, Arizona, June 23, 1874, at page 129, Book of Deeds. [4]

V.

That plaintiffs now are, and for the past forty-eight years they, or their predecessors in interest, have been, the owners in fee, and in the undisturbed possession of, the following described real estate now situate within the boundaries of the City of Phoenix, County of Maricopa, State of Arizona, as follows:

Commonly known as the Lount Tract, extending from the intersection point of the section line on the north side of Van Buren Street, between Sections 5 and 8; and the east side of Center Street east to Second Street, a distance of 704 feet; thence north to Taylor Street; thence west to Center Street; thence south to the place of beginning;

That said strip of land described in Division III of this affidavit was, and is now, an integral and component part and parcel of said Lount Tract; that no part of said tract has by plaintiffs, or by any authorized agent of theirs ever been platted or in any manner conveyed or dedicated to public use as a highway or street.

VI.

That plaintiffs, in their use, occupation and development of said property for mercantile and sales purposes, for themselves, and for the convenience of

their employees and tenants, have heretofore left thereon as an open space abutting on the north side of Van Buren Street certain paths and driveways in the said strip of land described in Division III of this affidavit for themselves for the uses and purposes aforesaid, and have connected same with certain other paths and driveways leading to other open spaces and driveways of said Lount Tract, and the use of same has, in the past, been allowed by the plaintiffs and they have never objected nor sought to restrain their neighbors or others of the public [5] from traveling over said open spaces which they had so provided for their own purposes as aforesaid, and in the enhancement of said tract and the development of their property interests therein, it has been in the past, and is now, considered desirable to keep said spaces open and all spaces in the said Lount Tract open and unobstructed so that any person may travel over the same, the same being a permissive right so to do, that has not heretofore been withdrawn by plaintiffs, and is and has been given without any intention on their part to dedicate said open space to public use other than as hereinbefore set forth.

VII.

That on the 23d day of July, 1919, said defendant, by a resolution of its Commissioners, No. 380, declaring its intention to improve certain portions of Van Buren Street, and declaring that bonds shall be issued to represent the cost and expense thereof, a copy of which resolution is hereto annexed and marked Exhibit "A," and made a part of this affidavit, wrongfully included in said proposed improvement all of

the strip of plaintiffs' land described in Division III of this affidavit in that: Said strip of land is an integral part and parcel of the said "Lount Tract" described in Division V of this complaint, and they and their predecessors in interest have for more than forty-eight years last past been the owners in fee and in the undisturbed possession of same; and that they have in no instance dedicated, or in any manner conveyed the same to public use; that the open space of said strip was so left for the use and purposes alone as hereinbefore set forth in Division VI of this affidavit;

That defendant, the City of Phoenix, by its action as aforesaid, is proceeding to take said strip of land for its own use and purposes without, first, proceeding to condemn [6] the same in the manner provided by the Statutes of Arizona, and in subdivision (e) Section 2 of Chapter 2 of the City Charter, which reads as follows:

"To acquire by purchase, condemnation or otherwise, within or without the city, such land and other property as may be necessary for the establishment, maintenance and operation of any public utility, or to provide for and effectuate any other public purpose; and to sell, convey, and dispose of the same for the common benefit."

That defendant is taking the same under a false and wrongful assumption that it is a public highway, and that it, as the City of Phoenix, is a distinct unit, empowered to take over, possess and control all property within its boundaries, without resort to the statutory requirements of the State of Arizona, legalizing and justifying such acquisitions;

That the taking of plaintiffs' property by this method is confiscation and a violation of the 14th amendment to the Constitution of the United States in that it is depriving plaintiffs of their property without due process of law, and will result in irreparable injury to plaintiffs;

That the City of Phoenix in its attempt to take possession of said strip of land is threatening to, and will, unless restrained by the process of this Court, change the width, arrangement and location of plaintiffs' paths and walks and driveways and destroy their utility and purposes for which they were planned and laid out by plaintiffs;

That the said defendant's possession of the property of plaintiffs described hereinbefore, and its proposed alleged improvements thereon, will entail upon plaintiffs a loss of not less than Six Thousand (\$6,000.00) Dollars; that the amount in controversy herein and for which plaintiffs [7] seek relief in this court is in excess of the value of Three Thousand (\$3,000.00) Dollars.

VIII.

Plaintiffs further allege: That on the 8th day of August, 1919, with the purpose of having the defendant desist from taking said strip of land described in Division III of this affidavit, without condemnation proceeding as required by the Statutes of Arizona and the City Charter of the City of Phoenix, they filed with the clerk of said City of Phoenix their protest, a copy of which is hereto annexed and marked Exhibit "B," and made a part of this affidavit; and again on the 17th day of October, 1919, they filed with

said City Clerk a protest against its awarding any contract for the improvement or doing of any act affecting said tract; a copy of which is hereto annexed and marked Exhibit "C."

IX.

That plaintiffs have no plain, speedy and adequate remedy in the premises either in law or in equity, and therefore apply to this Court for a writ of prohibition aforesaid directed to the defendant, the City of Phoenix, restraining and prohibiting it, its officers and agents, from proceeding under said Resolution No. 380, and from trespassing in, on or upon said strip of land, to wit:

"A strip of land 33 feet wide, extending from the east side of Center Street (according to the old town-site map of Phoenix, recorded in the office of the County Recorder of Maricopa County, State of Arizona, in Book One (1) of Maps at page Five (5), and running thence east 704 feet along the north side of the section line between sections 8 and 5, Township 1 North, Range 3 East, Gila and Salt River Base and Meridian in Maricopa County, Arizona, to a point; thence North 33 feet to a point; thence West 704 feet to a point; thence South 33 feet to the place of beginning";

without the consent of plaintiffs herein, and from making the improvements thereon as contemplated by defendant in [8] its published Resolution No. 380 of date July 23, 1919, and from doing any act or acts in furtherance of the purposes set forth in said resolution as affects this said land and from do-

ing any act whereby a lien or charge of any character in the nature of an improvement charge may be affixed to said strip of land, upon the ground that defendant had no jurisdiction to pass said resolution or to proceed thereunder, to occupy or trespass upon said land.

HATTIE L. MOSHER.

Subscribed and sworn to before me this 31st day of October, 1919.

J. B. WOODWARD,
Notary Public.

My commission expires Feb. 16th, 1920.

[Endorsements]: In the District Court of the United States, in and for the District of Arizona, Julia Mosher Collins, William B. Lount, and Hattie L. Mosher, Plaintiffs, vs. City of Phoenix, a Municipal Corporation, Defendant. Affidavit of Applicant for Writ of Prohibition. Filed Nov. 3, 1919. Mose Drachman, Clerk. By Nat. T. McKee, Deputy.
[9]

Exhibit "A."

RESOLUTION No. 380.

A resolution of the Commission of the City of Phoenix declaring its intention to improve certain portions of Van Buren Street in the City of Phoenix and determining that bonds shall be issued to represent the costs and expenses thereof, and declaring the work of improvement to be of more than local or ordinary public benefit, and that the costs of said work or improvement shall be assessed upon a certain district and providing that the proposed work

or improvement shall be performed under Title VII Chapter XIII, Revised Statutes of Arizona 1913 Civil Code, and amendments thereto.

BE IT RESOLVED BY THE COMMISSION OF
THE CITY OF PHOENIX:

Section 1.

That the public interest and convenience require, and that it is the intention of the Commission of the City of Phoenix, to order the following work to be performed, to wit:

1. That the roadway of Van Buren Street between the east line of Central Avenue and the west line of Sixteenth Street, including the intersections of all streets and alleys (excepting the north one-half of the roadway of Van Buren Street between a point 33.66 feet west of the center line of Twelfth Street in the City of Phoenix and the west line of Sixteenth Street, and the north one-half of the roadway of Van Buren Street, between the east line of Fifth Street and the Center line of Seventh Street, and the north one-half of the roadway of Van Buren Street between the center line of Ninth Street and a point one-hundred and seventy-five (175) feet east of the east line of Ninth Street, and the south one-half of the roadway of Van Buren Street between center line of Seventh Street and the center line of Eighth Street, and the south one-half of the roadway of Van Buren Street between a point two hundred (200) feet west of the west line of Twelfth Street and the center line of Twelfth Street and excepting also [10] the intersections of Fourth and Fifth Streets, be graded and paved with bitulithic with bituminous concrete

base as per Specification No. 20B.

2. That all private drives on both sides of Van Buren Street between the east line of Central and the west line of Twelfth Street, in the City of Phoenix, be graded and paved to a depth of five (5) inches with cement concrete as per Specification No. 30A.

3. That combined cement concrete curb and gutter be constructed on both edges of the roadway of Van Buren Street between the east line of Central Avenue and the west line of Twelfth Street (excepting at the intersection of streets, alleys and private drives and excepting also the north edge of the roadway of Van Buren Street between the east line of Fifth Street and the west line of Seventh Street, and the south edge of the roadway of Van Buren Street, between the east line of Seventh Street and the West line of Eighth Street, and the south edge of the roadway of Van Buren Street between the west line of Twelfth Street and a point two hundred (200) feet west of the west line of Twelfth Street, and the north edge of the roadway of Van Buren Street between the east line of Ninth Street and a point one hundred and seventy-five (175) feet east of the east line of Ninth Street, as shown on the plans.

That combined cement concrete curb and gutter be constructed as follows:

Along both edges of the roadway of Van Buren Street on both sides of Second Street, Third Street and Eleventh Street respectively; along the south edge of the roadway of Van Buren Street, on both sides of Sixth Street; along the south edge of the roadway of Van Buren Street on the west side of

Seventh Street; along the south edge of the roadway of Van Buren Street on the east side of Eighth Street; along the north edge of the roadway of [11] Van Buren on both sides of Godfrey Street, along both edges of the roadway of Second Street, Third Street and Eleventh Street, on both sides of Van Buren Street, along both edges of the roadway of Sixth Street on the south side of Van Buren Street; along the west edge of the roadway of Seventh Street on the south side of Van Buren Street; along the east edge of the roadway of Eighth Street on the south side of Van Buren Street; along both edges of the roadway of Godfrey Street on the north side of Van Buren Street as shown on the plans.

4. That cement curb be constructed along the edges of all alleys and private drives and along both edges of the roadway of Van Buren Street on both sides of First Street, and both edges of the roadway of First Street on both sides of Van Buren Street, both edges of the roadway of Ninth Street on south side of Van Buren Street, on south edges of the roadway of Van Buren Street on both sides of Ninth Street; on the west edge of the roadway of Ninth Street; on north side of Van Buren Street; and on the north edge of the roadway of Van Buren Street on west side of Ninth Street, as shown on the plans.

5. That cement gutters be constructed across all alleys and private drives and across the roadway of Third Street on both sides of Van Buren Street and across the roadway of Godfrey Street on the north side of Van Buren Street, as shown on the plans.

6. That one storm water manhole be constructed at each of the following locations on Van Buren Street near the east line of Second Street; near the east line of Sixth Street; near the center line of Eighth Street; approximately three hundred (300) feet east of the east line of Ninth Street; near the east line of Eleventh Street; as shown on the plans.

7. That gutter inlets of the number and location be constructed as follows: [12]

First Street, two (2); Second Street, two (2); Sixth Street, two (2); Eighth Street, three (3); approximately three hundred (300) feet east of east line of Ninth Street, two (2) and Eleventh Street, two (2); as shown on the plans.

That cement concrete stand-pipes of the number and location be constructed as follows:

Sixth Street, two (2); Seventh Street, four (4); Ninth Street, two (2); Eleventh Street, two (2); Twelfth Street, two (2); Sixteenth Street, one (1); and gates be placed in them to control the flow of water, as shown on the plans.

9. That corrugated iron pipe of the size and location be laid as follows:

Twelve (12) inches in diameter across the roadway of Van Buren Street on the east side of Seventh Street; Ninth Street; and Eleventh Street, and across the roadway of Sixth Street; Ninth Street; Eleventh Street, on the south side of Van Buren Street, as shown on the plans.

Fifteen (15) inches in diameter across the roadway of Van Buren Street, on the west side of Seventh

Street; Twelfth Street and Sixteenth Street, as shown on the plans.

That cement concrete pipe of the size to fit the aforementioned corrugated iron pipe, be laid from the stand-pipes and corrugated iron pipes to points six (6) feet back of the property lines and between gutter inlets and storm-water manholes and across all drive ways, as shown on the plans.

11. That street signs of the number and location be set as follows: First Street, four (4); Second Street, eight (8); Third Street, eight (8); Sixth Street, four (4); Seventh Street, four (4); Eighth Street, four (4); Ninth Street, two (2); Eleventh Street, eight (8); Godfrey Street, four (4); as shown on the plans.

12. That survey monument covers furnished by the City be [13] set at the following locations: First Street, two (2); Second Street, two (2); Third Street, two (2); Sixth Street, one (1); Seventh Street, two (2); Eighth Street, one (1); Ninth Street, one (1); Eleventh Street, one (1); Godfrey Street, One (1); Twelfth Street, two (2); Thirteenth Street, one (1); Fourteenth Street, one (1); Fifteenth Street, one (1); as shown on the plans.

13. That the roadway of intersecting streets and alleys be graded from the edge of the aforementioned pavement not to exceed ten (10) per cent until they meet the original surface.

All of the above work or improvement to be done in accordance with that certain set of plans approved and adopted by the Commission of the City of Phoenix on the 11th day of June, 1919, and on file in

the office of the City Engineer in Book Five of Street Improvement Plans on Pages 85 to 109, inclusive, and in further accordance with the following specifications:

Standard Specification of the City of Phoenix, Numbers 19, 21, 22, 24, 20B, 28 and 30A.

All of which above specifications are on file in the office of the City Clerk of the City of Phoenix. Said plans and specifications are hereby referred to for a more particular description of said work and are hereby made a part hereof.

Reference is hereby made to the Bitulithic License Agreement of Warren Brothers Company of Boston, Mass., dated April 2d, 1918, and on file in the office of the City Clerk of the City of Phoenix.

Section 2.

That the said contemplated work or improvement, in the opinion of the Commission, is of more than local or ordinary public benefit, and that the said Commission hereby makes the costs and expenses of said work chargeable upon a district, and hereby declares that the district in said City of Phoenix, benefited by the said work or improvement, and to be assessed to pay the costs and expenses thereof, is described as follows: [14]

The south one-half of Blocks 1, 14, 15, 28 and 29, Churchill Addition.

North one-half of Blocks 1, 2, 3, 4, 5, 6, and 7, Original Townsite.

Lots 35 to 51 inclusive, Monte Vista Place.

Lots 2, 3 and 4, Block 2, Dennis Addition.

Lots 1, 2, 3, 4 and 5, Sub. of Lot 5, Block 2, Dennis Addition.

Lots 1, 3 and 4, of Block 3, Dennis Addition.

Lots 3, 4, 10, 11, 12, 13, 14 and part of Lot 9, Marston Heights.

Lots 4 and 5, Block 1, Murphy Addition.

North one-half of Block 2, Murphy Addition.

Lots 1 to 10 inclusive, Porter and Baxter Sub.

North one-half of Blocks 1, 2, 3, and 4, Collins Addition.

Reference is hereby made to Book One of Assessment District Diagrams, Pages 27 to 34, on file in the office of the City Engineer of the City of Phoenix, for a more complete and detailed description of said district.

Section 3.

The said Commission finds that public convenience requires serial bonds shall be issued to represent the costs and expenses of such work or improvement, and said Commission determines that serial bonds shall be issued to represent each assessment of Twenty-five (\$25.00) Dollars or more for the costs and expenses of said work or improvement. Said serial bonds shall extend over a period ending nine (9) years from and after the second day of January next succeeding the date of said bonds and an even annual proportion of the principal sum thereof shall be payable by coupon on the second day of January every year after their date until all is paid and the interest shall be payable semi-annually by coupon on the second day of January and July, respectively of each year, at the rate of six (6) per cent per annum, on all

sums unpaid, until the whole of said principal sum and interest are paid. [15]

Section 4.

That these improvements shall be made, and all the proceedings therein shall be taken; that the Superintendent of Streets shall post notices thereof; that the City Clerk shall certify to the passage of this Resolution of Intention and shall cause the same to be published in the "Arizona Gazette," a daily newspaper published and circulated in the City of Phoenix and hereby designated for that purpose; that the City Engineer shall prepare duplicate diagrams of the district hereinbefore described in Section 2 of this Resolution of Intention, to be assessed to pay the costs and expenses thereof, under and in accordance with the provisions of Title VII, Chapter XIII, Revised Statutes of Arizona, 1913 Civil Code, and subsequent acts amendatory thereto.

Passed by the Commission of the City of Phoenix this 23d day of July, 1919.

S. W. BARNETT,
Vice Chairman.

I hereby certify that the above and foregoing Resolution No. 380, was duly passed by the Commission of the City of Phoenix at a meeting held in the Commission Chamber in the City Hall, July 23d, 1919, at which meeting a quorum was present thereat, voting in favor thereof.

FRANK THOMAS,
City Clerk.

Date of Pub. July 29-30-31, Aug. 1-2.

[Endorsement]: Exhibit "A." [16]

Exhibit "B."

PROTEST.

The undersigned respectfully protest to the City of Phoenix against the further publication, or in any manner, enforcement of its Resolution No. 380, dated July 23, 1919, as affects their land described as follows:

A strip of land 33 feet wide, extending from the east side of Center Street, (according to the old town-site map of Phoenix, recorded in the office of the County Recorder of Maricopa County, Arizona, in Book 1 of Maps, at page 5), and running thence east 704 feet along the north side of the section line between Sections 8 and 5, Township 1 North, Range 3 East of the Gila and Salt River Base and Meridian, in Maricopa County, Arizona, to a point, thence north 33 feet to a point, thence west 704 feet to a point, thence south 33 feet, to the place of beginning, which property has been owned and in the undisputed possession of the undersigned, and their immediate grantors of same, for upwards of 48 years, and is of the present value of \$35,000.00 and upwards; this protest is based upon the following facts, and for the following reasons:

1. That it is the apparent and declared purpose of the City of Phoenix, as expressed in said Resolution No. 380, so far as the above-described strip of land is concerned and included, to assume possession, ownership and control of same, as an integral part and portion of Van Buren Street for city uses and purposes, and public use, without condemnation pro-

cedure as required by the Statutes of Arizona, and as contemplated by the subdivision 2 of Section 2, of Chapter 2, of its City Charter.

2. Said Resolution No. 380 is an unlawful and declared intent to take plaintiffs' private property for a public use without compensation therefor as conditioned to be made by the laws of the State of Arizona.

3. The taking of the said above described land is [17] inhibited by Section 4, Article 2 of the State Constitution of the State of Arizona.

4. The taking of said property is inhibited by the Fourteenth Amendment of the Constitution of the United States, in that, it is depriving plaintiffs of their property without due process of law.

5. It is an unlawful and declared purpose and act of taking plaintiffs' property without compensation, and will impose, in addition thereto, upon them, a fixed, resultant burden, of upwards of \$6,000.00.

W. B. LOUNT,

By F. E. WARREN,

Att'y in Fact.

JULIA MOSHER COLLINS,

By HATTIE L. MOSHER,

Att'y in Fact.

H. L. MOSHER.

[Endorsement]: Exhibit "B." [18]

Exhibit "C."

PROTEST.

The undersigned respectfully protest to the City of Phoenix against its awarding any contract for the

improvement of or doing any act affecting the following land, namely:

A strip of land 33 feet wide, extending from the east side of Center Street (according to the old town-site map of Phoenix, recorded in the office of the County Recorder of Maricopa County, Arizona, in Book 1 of Maps, at page 5) and running thence east 704 feet along the north side of the Section line between Sections 8 and 5, Township One North, Range 3 East of the Gila and Salt River Base and Meridian, in Maricopa County, Arizona, to a point; thence North 33 feet to a point; thence west 704 feet to a point; thence south 33 feet to the place of beginning, for the reasons assigned in their protest to City Resolution No. 380, dated July 23, 1919, filed with the City Clerk of Phoenix August 8, 1919.

This notice is made in pursuance of Paragraph 1916 of the Revised Statutes of Arizona, 1915, and amendments thereto.

Dated: Phoenix, Arizona, October 17, 1919.

W. B. LOUNT,

By F. E. WARREN,

His Attorney in Fact.

JULIA MOSHER COLLINS,

By HATTIE L. MOSHER,

Her Attorney in Fact.

H. L. MOSHER.

[Endorsement]: Exhibit "C." [19]

In the District Court of the United States in and for
the District of Arizona.

No. 380—PHOENIX.

JULIA MOSHER COLLINS, WILLIAM B.
LOUNT and HATTIE L. MOSHER,
Plaintiffs,

vs.

CITY OF PHOENIX, a Municipal Corporation,
Defendant.

Answer.

Comes now the defendant in the above-entitled cause and in answer to the application for the writ of prohibition herein admits, denies and alleges as follows:

It admits that it is a municipal corporation as alleged in Paragraph II of the plaintiffs' affidavit.

It admits the residence of the plaintiffs, as stated in Paragraph III of said affidavit.

It denies that plaintiffs, or their predecessors in interest, have been for forty-eight years and now are the owners in fee of the strip of land thirty-three feet wide described and set forth in Paragraph III of said affidavit.

It denies that plaintiffs, as alleged by them in Paragraph V of said affidavit, have been and are the owners in fee and in the undisturbed possession of said strip of land for the past forty-eight years or that said strip of land is now an integral or com-

ponent part or parcel of the tract described therein as the Lount Tract.

It states that, contrary to the statement in Paragraph V of said affidavit, said tract has been platted and [20] dedicated to the public use as a highway or street, as hereinafter set forth.

It denies that the plaintiffs have used, occupied or developed said strip for mercantile or sales purposes for themselves or for the convenience of their employees and tenants or that they have left said strip of land or any part of it as an open space and for certain paths and driveways thereon for themselves, or has connected said strip of land with certain other paths and driveways leading to other open spaces and driveways for their private use and purpose or that the use by the public of said strip of land has been a mere permissive right given without any intention on their part or the part of their predecessors in interest to dedicate the same to public use.

But in this behalf the defendant charges the facts to be as follows:

That the said strip of land lies along and is contiguous to the section line between Sections 5 and 8 of Township 1 North, Range 3 East, Gila and Salt River Base and Meridian.

That, ever since the time the title to said strip of land was acquired from the Government by the predecessors in interest of plaintiff, said strip has been recognized, used and occupied by the public, with the full knowledge, acquiescence and consent of the plaintiffs and their predecessors in interest, as a public road, highway or street.

That, on the 10th day of January, 1888, there was filed with the County Recorder of Maricopa County, Arizona, a plat of the quarter-section in which said strip of land is included, to wit, the Southeast quarter of Section 5, Township 1 [21] North, Range 3 East, of the Gila and Salt River Base and Meridian, as an addition to the City of Phoenix, and that a copy of said map so filed as aforesaid is hereto annexed, marked Exhibit "A" and made a part hereof. That said addition, as set forth in said map, was then and has ever since been known as Churchill's Addition to the City of Phoenix.

Defendant further alleges that, by Ordinance No. 192 of the said City of Phoenix, approved February 27th, 1895, said quarter-section, including the strip of land in question, was annexed to and included within the corporate limits of the City of Phoenix, a copy of which said ordinance is hereto attached, marked Exhibit "B" and made a part hereof. That ever since the passage of said ordinance the said quarter-section, including the strip of land set forth and described in plaintiffs' affidavit has been and now is a part of and included within the corporate limits of the City of Phoenix.

Defendant further alleges that, on the 7th day of September, 1898, the Common Council of the said City of Phoenix adopted an ordinance known as Ordinance No. 275, which said ordinance adopted an official plat of the resurvey of said Churchill's Addition to the City of Phoenix, which included, as aforesaid, said strip of land, and on which said plat there appeared said strip of land as a part of the street

known as Van Buren Street. That in said ordinance it was declared that all streets, including said Van Buren Street and said strip of land as a part thereof, were declared to be public and dedicated to public use and benefit at large and requiring, under penalty, all persons to conform to said map or plat. That a copy of said plat so adopted is hereto annexed marked Exhibit "C" and made a part hereof. That ever since the annexation of said Churchill's Addition said strip of land has been used and occupied by the public and has been recognized by the City of Phoenix as a part of and parcel of Van Buren Street, and no part [22] or parcel thereof has been used by plaintiffs except as part of the public.

Defendant further alleges that the plaintiffs herein and their predecessors in interest have acquiesced in the acts and things hereinbefore set forth relating to the platting of said addition and the annexation of the same and have acquiesced in the use of said strip of land, first as a highway and then, after the annexation of said land as a part of said City, has ever since acquiesced in the possession and control of the same by said City as a part and parcel of Van Buren Street in said City, and has ever since acquiesced in its use as a public street.

Defendant further alleges that, for more than twenty years prior to the institution of this suit, the said strip of land has been used and occupied as a public highway and street of said City and said City has been in the open, notorious, peaceable, adverse and exclusive possession and control of said strip of

land as a part of said street, devoted and dedicated to public use.

Defendant further denies that it is depriving plaintiffs or attempting to deprive plaintiffs of any property belonging to them without due process of law, or that any act or thing complained of will result in irreparable or any injury to plaintiffs.

It further denies that it will, in any way, change the width, arrangement and location of any paths, walks or driveways or destroy the utility and purpose of any walks, paths and driveways planned and laid out by plaintiffs.

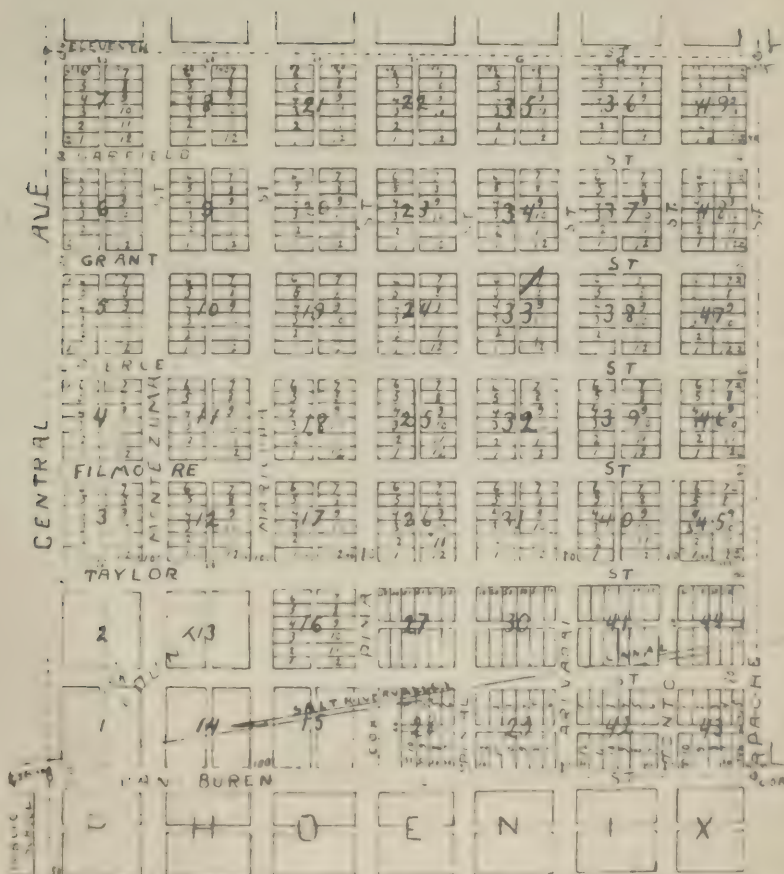
It denies that, by the proposed improvements mentioned by plaintiffs in their affidavit or by any improvements proposed [23] to be erected on said strip of land, plaintiffs will suffer a loss of Six Thousand Dollars, or any loss whatsoever.

WHEREFORE defendant, having fully answered, prays that it be dismissed hence with its costs.

RICHARD E. SLOAN,
Attorney for Defendant.

[Endorsements]: No. 380—Phoenix. In the District Court of the United States, District of Arizona. Julia Mosher Collins et al., Plaintiffs, vs. City of Phoenix, Defendant. Answer. Filed Nov. 22, 1919. Mose Drachman, Clerk. By Nat T. McKee, Deputy.
[24]

PLAT OF THE SURVEY OF THE CHURCHILL ADDITION TO THE CITY OF PHOENIX.



Filed and recorded at the request of
Clark Churchill Junior, master in chancery
A.M.
Recorded in book 1 of maps page 15

(Exhibit "A")

Exhibit "B."

ORDINANCE No. 192.

An ordinance annexing to the City of Phoenix, in the County of Maricopa, Territory of Arizona, the land, property and territory, situated, lying and being in said County and Territory, to wit: The southeast quarter ($\frac{1}{4}$) of section five (5), in township one (1) north, range three (3) east of Gila and Salt River Base and Meridian.

Whereas, a petition has been filed with the City Recorder, and the Common Council of the City of Phoenix, signed by the owners of more than one-half in value, according to the last assessment in Maricopa County, Territory of Arizona, hereinafter mentioned, to wit: The southeast quarter ($\frac{1}{4}$) of section five (5), in township one (1) north, range three (3) east, Gila and Salt River Base and Meridian, according to the United States survey, and commonly known as the Churchill's addition, to the City of Phoenix, and lying contiguous thereto, and not embraced within its limits, and asking that said tract of land, property and territory, be annexed to said city in conformity with the provisions of Section one, of an Act entitled, "An act authorizing incorporated cities to extend and enlarge their limits," approved April 12th, 1893.

Now, therefore, the Common Council of Phoenix do ordain as follows:

Section 1. That the said property and tract of land and territory, hereinbefore mentioned, and described, be, and the same is hereby annexed to, made

a part of, and included within the corporate limits of the City of Phoenix, County of Maricopa, Territory of Arizona, and the same, and every part thereof shall hereafter be a part and parcel of said city, for all purposes whatsoever.

Sec. 2. This ordinance shall be in force and effect from and after its passage and publication according to law. [26]

Passed by the Common Council this 27th day of February, A. D. 1895.

Approved the 27th day of February, A. D. 1895.

J. D. MONIHON,
Mayor.

Attest: ED. SCHWARTZ,

City Recorder.

(Filed as part of Defendant's Answer.) [27]

CHURCHILLS AD'VN

2nd 11/17/1894

YUMA COUNTY
ARIZONA TERRITORY.

Range 13 is the same as Range (12.4) at Station No. 15. Township
10 N. and Range 13 E. East of the divide of the River Blase
and Meridian.

DEDICATION

The western part of Phoenix runs into streets, and the Grid all the way along all of the South East quarter (SE 1/4) of Section 1, Range (15). The strip of land is within Range (15) East of the Grid and Salt River Base and is within a section which runs as the official and complete part of the reservation of the City of Phoenix. The City of Phoenix, Maricopa County, Arizona, has the right to take and use the land giving it a right of use also the right to take and use the land and within all streets and easements, the right of all maps, and the right to use the land to the end of said reservation of the City of Phoenix and the State of Arizona to a large amount of land and money donated to the people according to the terms of the 215th section of the City of Phoenix Act.

... City of Providence
... Council of the City of Providence & the
... Mayor of said City ...
... by the City Treasurer or his duly authorized agent

and this Friday, 17 September AD 1898 The Common Council
of the City of Phoenix by J. C. Rogers Mayor

11/24/21 - 11/24/21 (S. 1)

[illegible]

In the District Court of the United States, in and
for the District of Arizona.

No. EQ.—90.

JULIA MOSHER COLLINS, WILLIAM B.
LOUNT, HATTIE L. MOSHER,
Plaintiffs,

vs.

CITY OF PHOENIX, a Municipal Corporation,
Defendant.

Findings and Judgment.

The above-entitled cause came on to be heard this 12th day of March, 1920, upon the sworn complaint of plaintiffs and the answer of defendant filed herein, J. B. Woodward, Esq., appearing for the plaintiffs, and Richard E. Sloan, Esq., and J. E. Nelson, Esq., for the defendant;

Thereupon the Court heard the evidence offered in behalf of the plaintiffs and also the evidence offered in behalf of the defendant, and having heard all the testimony and evidence offered in behalf of the respective parties, the said cause was thereupon submitted to the Court for his decision, and the Court being fully advised in the premises does now find as follows:

1. That the allegations in plaintiffs' complaint, that they are, and for the past forty-eight years they or their predecessors in interest have been, the owners in fee and in the undisturbed possession of the real estate described and set forth in their said

complaint; and the further allegations that said land was, at the time of the commencement of this action or is now an integral and component part and parcel of the tract described in said complaint as the "Lount Tract," and that no part of said tract has been by plaintiffs or by any authorized agent of theirs ever been dedicated to public use as a highway or street, are each not [29] sustained by the evidence but are each shown by the evidence to be untrue.

2. That for more than twenty years prior to the commencement of this action, the defendant, City of Phoenix, has been in open, notorious, peaceable, adverse and exclusive possession and control of the strip of land in controversy, claiming, using and occupying the same as a public highway and street of said City.

3. That the said strip of land was, more than twenty years prior to the commencement of this action, dedicated by plaintiffs and their predecessors in interest to the public as a public highway and street of said City, which said dedication was duly accepted by the public and by the City of Phoenix as such public highway and street of said City; and that the said strip of land ever since said dedication, and acceptance thereof, has been and now is a part of Van Buren Street of said City of Phoenix.

4. That neither the plaintiffs nor their predecessors in interest have been the owners of or in the possession of said strip of land at any time during the period of at least twenty years prior to the commencement of this action.

As conclusions of law from the foregoing facts, the Court finds:

First: That the defendant is in the lawful possession and control of said strip of land as a part and parcel of said Van Buren Street, and possesses full power and authority to improve the same and otherwise to deal with the same as a public highway and street of said City.

Second: That the plaintiffs, and neither of them, have any right, title and interest in and to said land, or any part thereof.

Third: That the plaintiffs are not entitled to recover in this action. [30]

Fourth: That the defendant is entitled to a judgment against said plaintiffs for its costs.

WHEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED that the plaintiffs take nothing by this action and that the defendant recover its costs herein expended, taxed at the sum of \$71.60.

Done in open court this 12th day of March, 1920.

DAVID P. DYER,
Judge.

[Endorsements]: No. Eq. 90. In the District Court of the United States, in and for the District of Arizona. Julia Mosher Collins, William B. Lount, Hattie L. Mosher, Plaintiffs, v. City of Phoenix, a Municipal Corporation, Defendant. Findings and Judgment. Filed March 13, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [31]

In the District Court of the United States, in and for
the District of Arizona.

E.-90.—IN EQUITY.

JULIA MOSHER COLLINS, WILLIAM B.
LOUNT, HATTIE L. MOSHER,

Plaintiffs,

vs.

CITY OF PHOENIX, a Municipal Corporation,
Defendant.

Petition for Appeal.

To the Honorable WILLIAM H. SAWTELLE,
District Judge for the District of Arizona:

The above-named plaintiffs, feeling themselves aggrieved by the findings of fact and decree made and entered in this cause on the 12th day of March, 1920, do hereby appeal from said findings and decree to the Circuit Court of Appeals for the Ninth Judicial Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and pray that their appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, sitting at San Francisco, California.

And your petitioners further pray that the proper order touching the security to be required of them to perfect their appeal be made.

J. B. WOODWARD,
Attorney for Petitioners.

[Endorsements]: E.-90—In Equity. In the District Court of the United States in and for the District of Arizona. Julia Mosher Collins, William B. Lount, Hattie L. Mosher, Plaintiffs, v. City of Phoenix, a Municipal Corporation, Defendant. Petition for Appeal. Filed Mch. 31, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk.

Service of copy accepted this March 31st, 1920.

JAMES E. NELSON,
Atty. for Defendant. [32]

In the District Court of the United States, in and for
the District of Arizona.

E.—90.

JULIA MOSHER COLLINS, WILLIAM B.
LOUNT, HATTIE L. MOSHER,

Appellants,

vs.

CITY OF PHOENIX, a Municipal Corporation,
Appellee.

Amended Assignment of Errors.

Come now Julia Mosher Collins, William B. Lount and Hattie L. Mosher, appellants herein, and in connection with their petition for appeal, assign the following errors:

FIRST: The Court erred in finding the following facts:

“1. That the allegations in plaintiffs’ complaint, that they are, and for the past forty-

eight years they or their predecessors in interest have been, the owners in fee and in the undisturbed possession of the real estate described and set forth in their said complaint; and the further allegations that said land was, at the time of the commencement of this action or is now an integral and component part and parcel of the tract described in said complaint as the 'Lount Tract,' and that no part of said tract has been by plaintiffs or by any authorized agent of theirs ever been dedicated to public use as a highway or street, are each not sustained by the evidence but are each shown by the evidence to be untrue.

2. That for more than twenty years prior to the commencement of this action, the defendant, City of Phoenix, has been in open, notorious, peaceable, adverse and exclusive possession and control of the strip of land in controversy, claiming, using and occupying the same as a public highway and street of said City. [33]

3. That the said strip of land was, more than twenty years prior to the commencement of this action, dedicated by plaintiffs and their predecessors in interest to the public as a public highway and street of said city, which said dedication was duly accepted by the public and by the City of Phoenix as such public highway and street of said City; and that the said strip of land ever since said dedication, and acceptance thereof, has been and now is a part of Van Buren Street of said City of Phoenix.

4. That neither the plaintiffs nor their predecessors in interest have been the owners of or in the possession of said strip of land at any time during the period of at least twenty years prior to the commencement of this action."

SECOND: The Court erred in finding the following conclusions of law based on the above and foregoing findings of fact:

"First: That the defendant is in the lawful possession and control of said strip of land as a part and parcel of said Van Buren Street, and possesses full power and authority to improve the same and otherwise to deal with the same as a public highway and street of said city;

Second: That the plaintiffs, and neither of them, have any right, title and interest in and to said land, or any part thereof;

Third: That the plaintiffs are not entitled to recover in this action.

Fourth: That the defendant is entitled to a judgment against said plaintiffs for its costs."

THIRD: The Court erred in adjudging that the plaintiffs take nothing by their action and that the defendant recover its costs.

FOURTH: The judgment and findings are against the [34] manifest weight of evidence.

FIFTH: The judgment and findings are contrary to law.

WHEREFORE, appellant prays that the judgment and decree of the District Court of the United States in and for the District of Arizona, made and

entered on the 12th day of March, 1920, may be reversed.

J. B. WOODWARD,
Attorney for Appellants.

[Endorsements]: E.—238. In the District Court of the United States, in and for the District of Arizona. Julia Mosher Collins, William B. Lount, Hattie L. Mosher, Appellants, vs. City of Phoenix, a Municipal Corporation, Appellee. Amended Assignment of Errors. Filed April 26, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk.

Service of copy accepted this April 26, 1920.

RICHARD E. SLOAN,
Atty. for Deft. [35]

In the District Court of the United States, in and for
the District of Arizona.

E.—90—IN EQUITY.

JULIA MOSHER COLLINS, WILLIAM B.
LOUNT, HATTIE L. MOSHER,

Plaintiffs,

vs.

CITY OF PHOENIX, a Municipal Corporation,
Defendant.

Order Allowing Appeal and Fixing Bond.

This matter coming on for hearing this — day of April, 1920, on petition of Julia Mosher Collins, William B. Lount and Hattie L. Mosher, plaintiffs herein, for an order allowing their appeal;

IT IS HEREBY ORDERED that the appeal in the above-entitled matter to the United States Circuit Court of Appeals for the Ninth Judicial Circuit be, and the same is hereby allowed as prayed, upon petitioners filing a bond in the sum of \$500.00 with sufficient surety, conditioned as required by law, for the payment of the costs of such appeal.

Done in open court this 12th day of April, 1920.

WM. H. SAWTELLE,

Judge of the District Court of the United States for the District of Arizona.

E.—90—In Equity. In the District Court of the United States, in and for the District of Arizona. Julia Mosher Collins, William B. Lount, Hattie L. Mosher, Plaintiffs, vs. City of Phoenix, a Municipal Corporation, Defendant. Order Allowing Appeal and Fixing Bond. Filed April 12, 1920. C. R. McFall, Clerk United States District Court for the District of Arizona. [36]

In the District Court of the United States, in and for the District of Arizona.

E.—90.

JULIA MOSHER COLLINS, WILLIAM B.
LOUNT, HATTIE L. MOSHER,
Appellants,

vs.

CITY OF PHOENIX, a Municipal Corporation,
Appellee.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, Julia Mosher Collins, William B. Lount, and Hattie L. Mosher, as principals, and H. J. Brazee and F. E. Warren, as sureties, are held and firmly bound unto the City of Phoenix, a Municipal Corporation, in the full and just sum of \$500.00, to be paid to the said City of Phoenix, its certain attorneys, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 23d day of April, A. D. 1920.

WHEREAS, at a late term of the District Court of the United States for the District of Arizona, in a suit pending in this Court between Julia Mosher Collins, William B. Lount and Hattie L. Mosher, as plaintiffs, and City of Phoenix, a Municipal Corporation, as defendant, a judgment was rendered against the said Julia Mosher Collins, William B. Lount and Hattie L. Mosher, plaintiffs, for the possession and ownership of certain land, and for \$71.60 costs, and the said plaintiffs, Julia Mosher Collins, William B. Lount and Hattie L. Mosher having obtained [37] an appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit of the United States, which appeal was allowed, to reverse the judgment of the aforesaid suit;

Now, the conditions of the above obligation are such that if the said Julia Mosher Collins, William B.

Lount and Hattie L. Mosher shall prosecute their appeal to effect, and will pay the amount of said judgment and answer all damages and costs if they fail to make their plea good, then the above obligation is to be void; else to remain in full force and virtue.

(Signed) JULIA MOSHER COLLINS.

By HATTIE L. MOSHER,

Atty. in Fact.

WILLIAM B. LOUNT,

By F. E. WARREN,

Atty. in Fact.

HATTIE L. MOSHER,

Principals.

H. J. BRAZEE,

F. E. WARREN,

Sureties.

[Endorsements]: E.—90. In the District Court of the United States, in and for the District of Arizona. Julia Mosher Collins, William B. Lount, Hattie L. Mosher, Appellants, vs. City of Phoenix, a Municipal Corporation, Appellee. Bond on Appeal. Approved Richard E. Sloan, E. G. Scott. Approved and Filed April 27, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [38]

In the District Court of the United States, in and for
the District of Arizona.

E.—90.

JULIA MOSHER COLLINS, WILLIAM B.
LOUNT, HATTIE L. MOSHER,

Plaintiffs,

vs.

CITY OF PHOENIX, a Municipal Corporation,
Defendant.

Statement of Evidence.

This cause having duly come on for trial on the 12th day of March, 1920, and Sam R. Criswell having been duly sworn as reporter to take down the testimony adduced in shorthand and transcribe the same to longhand, the following testimony was thereupon adduced:

Testimony of Hattie L. Mosher, for Plaintiff.

HATTIE L. MOSHER, a witness called on behalf of plaintiff, being duly sworn, testified as follows on direct examination:

My name is Hattie L. Mosher. Julia Mosher Collins is my daughter and William B. Lount is my brother. William B. Lount resides in Oakland and my daughter resides in Portland, Oregon, and they were so residing at the time this action was brought. I reside here. Samuel D. Lount was my father. I have a deed from B. L. Conyers and Isabel Conyers to Samuel D. Lount, dated September 21st, 1881, filed

(Testimony of Hattie L. Mosher.)

for record in the Recorder's Office of Maricopa County, September 21st, 1881. (This deed was thereupon received in evidence, marked Plaintiff's Exhibit "A" and filed.)

Samuel D. Lount went into possession of the Lount Tract September 21st, 1881, and the Lount Tract has since remained in the possession of the family—my mother and father, [39] brother, daughter and myself—and has never since been out of our possession. (Witness thereupon identifies a blue-print of survey made by City Engineer Davidson of the Churchill Addition to the City of Phoenix, filed in the office of the Recorder of Maricopa County, September 30th, 1898, and points out the Lount Tract thereon to the court. Thereupon the blue-print is received in evidence, marked Plaintiff's Exhibit "B" and filed.)

The present value of the strip of land in dispute, being thirty-three (33) feet by seven hundred four (704) feet, is thirty-five to forty thousand, possibly forty-five thousand dollars. From the time my father took possession of this strip of land in connection with the other land north in 1881 down to the present time, we and our predecessors in interest have had the land cultivated. At the time we took possession it was just farming land, ranch land, and we had it cultivated in one way and another and different parts in trees and towards the last a rose garden. It was used for general purposes as the whole ranch and whole place was used. That use extended continuously from 1881 until 1895. In 1895 we gave a right of way to the street-car people to

(Testimony of Hattie L. Mosher.)

cross. That strip of fence that was there at that time was torn down across their right of way and on each side of it the cultivation gradually became less and less. The last use that was made of it was on the west side of what is now First Street where there are some ornamental trees I had planted on the tract. Between First and Second Streets I had a rose garden and there are some ash trees we planted there at the present time. I had a rose garden there after 1895 and the last remains of that stood until 1901 and there were still some roses in there in 1909, but from 1895 until about 1900 or 1901 the fence began gradually to disappear and after that people began to drive along [40] what would be our line and then for our convenience we drove along it. We put a pathway in order that we could go ourselves on our land, and the public began to walk over there a little bit, and we never objected to it, and the rose garden I spoke of gradually got narrower and narrower in between. I remember seeing the last ones there in 1907 or 1909. This thirty-three (33) feet was enclosed by a barb-wire fence. This fence will show on a map I have. (Thereupon a map or sketch of the City of Phoenix made in 1885 by C. J. Dyer, an engineer, was offered in evidence, but upon objection by defendant was received tentatively by the Court to be ruled upon later and was marked Plaintiff's Exhibit "C" for identification.)

The fence (indicating on this map) extends from the point which we call Second Street to the fence here which we call Center Street and the line which

(Testimony of Hattie L. Mosher.)

shows here is the middle of what is Van Buren Street, the ground in dispute, is thirty-three (33) feet which runs in a line from here which is the north side of Van Buren Street. It is the thirty-three (33) feet between the section lines. If you take a continuous line of what is the north side of Van Buren Street east of our property and run down there this 704 feet, it is the thirty-three feet that is between that line and the section line. The fence is on the section line here or it was in 1885. The fence was put right about here where it shows red on the map. I do not know who put the fence there. It was there in the summer of 1880. I first saw it there the year before we bought the place. The conditions remained the same as they appear upon that sketch from 1885 until the right of way was given to the street-car to go through. The fence was probably torn down when they crossed it. It was probably torn down twenty or twenty-five feet in the middle of the street, and east and [41] west of it it remained the same and did remain the same for two or three or four years until the condition gradually changed. Some of the relics of the uses we put it to were still there from 1907 to 1909. We and our predecessors have never dedicated to the City or to the public use this strip of land or any part of the same and the City or the public have never until now asserted any right in the strip. None of the plaintiffs have ever objected to the public traveling over this strip and are not now objecting to the public traveling over same. We left an open space through our tract to enhance the value of our property and

(Testimony of Hattie L. Mosher.)

for our own convenience to make it possible for us to go from one part of our property to another and for the convenience of our tenants and customers. That strip that was left entirely around our place was left so we could get all around our property, so that if in the future we ever wanted to sell any property to others outside of the family, we would have the tract so arranged that we could give to them a right of way that would serve all of their purposes and the traffic.

Cross-examination.

I have paid taxes on that strip of land. The taxes are being paid on that roadway. We have always paid all the taxes ever demanded of us. I consider that because I am paying taxes on the property adjoining this strip that I am paying taxes on this strip. The Lount Tract was always assessed in its entirety. I have paid taxes upon this property within the last ten years. During the last ten years assessment has been placed upon the property designated as blocks, but there was nothing designated as where the blocks were. (Witness thereupon identifies her signature, that of William B. Lount, her brother, Julia Collins, her daughter, by Mrs. Mosher; also signature of Mr. Porterie and of Mr. Hickey upon the paper presented to her by counsel for defendant.) [42] I filed that paper with the City Clerk, I am sure. I passed it around and got signatures and signed it and filed it. (Thereupon paper designated petition and protest against the paving of Van Buren Street, was read into the record by counsel for defendant and was marked Defendant's Exhibit 1.

Testimony of A. S. Mills, for Plaintiffs.

A. S. MILLS, a witness called on behalf of plaintiffs, being duly sworn, testified as follows, on direct examination:

My name is A. S. Mills, and I am a newspaper publisher, at the present time publishing "The Messenger," a weekly paper in Phoenix. I came to Phoenix the last day of January, 1891, and I have lived here most of the time since. I am acquainted with Mrs. Mosher and Mr. Lount and the Lount family. I knew Samuel D. Lount very well in his lifetime. I observed and knew the locality known as Van Buren Street, running from Central Avenue to Second Street, and have known the locality for about twenty-nine years, I suppose. It wasn't a street then, but I have known the locality for that length of time. In 1891 it wasn't a street. At that time the entire tract hadn't been subdivided, the ten-acre tract or whatever size tract it was. I used to pass around it. I happened to know the condition of the street because at that time I was working with the "Arizona Republican" and living across the street from the Adams Hotel and I know I could not go through in that direction to Mr. Lount's; I always had to go down Monroe Street. The Mognett Tract lay north of the Lount Tract and when I went out there to see them, I went out Center Street to the far corner of what would be the Lount Tract now—I believe that's Pierce Street—and then went east a distance of three blocks to Mrs. Mosher's place. There was only a road at that time. I do not know that

(Testimony of A. S. Mills.)

the strip of land was ever all cultivated. There were some rose gardens and things in next [43] to Mrs. Lount's. I think there were some there after Mrs. Lount had built her new residence about 1904 and 1905. There was an old wire fence of some kind there. I do not know what kind of posts. That fence would be about where the center of the street is now, that is what is called the street there, and at the corner of Second Street and Van Buren at that time it extended out there halfway across the street. Mr. Porterie has a little fence of some kind that extended eight feet in front of his house and then that fence extended probably half the width of the street. The street was probably sixty feet wide; it left about twenty-five feet between the old wire fence, and that went down the center of what is called Van Buren Street and Mr. Porterie's to where First Street crosses and there is probably thirty feet—just about the center of the street. The fence was not in a good state of repair, kept getting worse year by year and eventually vanished. I first started visiting the Lounts in the summer of 1892, and there was more or less travel over the north half of Van Buren Street, the portion that was north of the fence I have spoken of, after the street-car line went through, but never cleared up until probably ten years after that, eight or nine, anyway. In 1905 the street was not entirely cleared, but at that time there were some relics of the rose garden that used to exist and there were some mulberry trees, and they had little irrigation ditches running

(Testimony of A. S. Mills.)

from the lot and curving down so they kept these trees watered. That was in the 33-foot strip and Mrs. Mosher was trying to beautify the place some by rose-bushes, so she had rose-bushes on both sides of the little grove of trees. I could not give the exact date when I observed the public traveling over this street generally. They were traveling over it pretty generally in 1905 and 1906, when I used to call at Mrs. Lount's. The street was fairly [44] well open then. That would be fourteen or fifteen years ago. The travel over the street at that time included wagons as well as pedestrian travel. The wagon road was crowded to the south side. There was always at least twenty-five feet if there wasn't too much travel that people would crowd through. It wasn't a real street, a passable street, and all travel was by the streets to the south.

On Cross-examination.

I do not know whether it was regarded as a street. It was called Van Buren Street. It wasn't used as a street. There were quite a number of people living there at that time. Center Street has been widened and improved a good deal since then. It was only a big road at that time. I am speaking now of when I first came here. In 1904 Center Street was pretty much of a street, not quite as well improved as it is now, but a good street in 1904, but Van Buren Street was not. Van Buren Street isn't today so much of a thoroughfare. A great deal of the traffic is diverted now, I suppose on account of conditions. It never has been traveled as much as

(Testimony of A. S. Mills.)

a great many other streets. It has been improved some, though, and I think there has been some grading done on that portion of it, but I don't know who did it. I do not recall having seen Van Buren Street sprinkled. I have never lived on that street. I have lived a short distance from it, south of it and west of it.

Redirect Examination.

I do not mean that the 33 feet was always known as a street. I mean that there was a strip through that country that was called Van Buren Street, whatever there was there. I do not know whether it applied to these two blocks or not, but I know the east and west line through there was called Van Buren Street. It was very much discussed for many years [45] about widening Van Buren Street so as to make it big enough to travel. There was a road, a sort of a family road, south of the line fence, that I called Van Buren Street.

Testimony of Victor A. Redewill, for Plaintiffs.

VICTOR A. REDEWILL, a witness called on behalf of plaintiffs, being first duly sworn, testified as follows on direct examination:

My name is Victor A. Redewill. I live here and am engaged in the piano business. I am acquainted with Mrs. Mosher, Mrs. Collins and William B. Lount, and have known them ever since I came here. They were my neighbors. When I was a very young boy, there was an offset in the street and there was a barb-wire fence running somewhere

(Testimony of Victor A. Redewill.)

near the middle of that street. There was a barbwire fence there which wasn't taken down, but was sort of knocked down piecemeal. I couldn't say exactly when the last post was taken up. There was a hole made in the fence at First Street for the street-car to go through in 1895. In 1895 there were mulberry trees growing just inside of this fence and the boys used to climb through the fence to get the mulberries and gradually knocked the fence down. The strip north of the wire fence was cultivated down to 1902 or 1903, somewhere along there. My best recollection is it was somewhere around 1902 or 1903 or 1904. This was generally called Van Buren Street. There was an offset in the street and the people to get past there had to go on the south side of the street. The street wasn't used very much. They used Second Street and when they did go, they went on the south side of the street which would be south of the section line. That condition of things remained, to my recollection, to the early nineteen hundreds. After the fence went down, the people used part of the street. They started to use both parts somewhere around 1903 or 1904. [46]

Testimony of Eugene Redewill, for Plaintiffs.

EUGENE REDEWILL, a witness called on behalf of plaintiffs, being first duly sworn, testified as follows on direct examination:

My name is Eugene Redewill. I am in the piano business here and am a brother of Victor Redewill. I have lived here most of my life and have known

(Testimony of Eugene Redewill.)

the plaintiffs in the case ever since I came here. My recollection of Van Buren Street in 1890 and 1891 is that it wasn't a regular thoroughfare at that time. I lived across the street on the northeast corner of Van Buren and Second Streets and we were obliged to reach our home by going up Second Street. Van Buren Street went east of there, but the Lount property, which was Mrs. Mosher's father's property, at that time was in a great big square by itself. Streets were not cut through and it was practically one big parcel of land. It was possible to get through from center on Van Buren Street, but it wasn't a road that was used at all. The Lount property was partly wired in there and there was quite a growth of sun flowers and weeds, just as you will find on the far outskirts of the town to-day. It was practically impassable. I don't believe there was any street through there that was recognized as any kind of a street at all until after 1900, probably a year or two before 1905. I cannot tell you the exact year. My recollection is that the Lount property took in that street; their barb-wire fence ran about what would be the middle of the street now and I know that my father complained that Mr. Lount was not very progressive. He wanted to have a street through and Mr. Lount had his property and his front gate came quite a ways south past our corner and the result was there was no chance of getting a street through there until they had some system and some bridges crossing the corner. Finally the street-car line went up First Street and development

(Testimony of Eugene Redewill.)

took place by which First Street [47] was cut through and a bridge put over for the car line and then that led to the development of Van Buren Street, but the Lount property practically took in Van Buren, or half of it anyhow. My recollection is that there was a barb-wire fence there that was never taken down. We used to crawl through the barb-wire to get mulberries. There was a big row of mulberry trees inside the fence. Then there were some later improvements, but I don't know when those went in there. The present trees were planted after that and then Mrs. Lount had another fence inside of that; a woven wire fence or something like that, and this woven wire fence simply went around the house. I don't believe there was any travel through there south of the wire fence of Lount's, but the fence was taken down on Van Buren—the road wasn't good, wasn't anybody selected it unless they would want to cut through. Monroe, one block south, was a good road and a good amount of the travel came up Monroe and out Second Street.

On Cross-examination.

I do not know when that fence was built. It was there when I first came about thirty years ago.

This closed plaintiff's case. Ordinance No. 275 of the City of Phoenix, which is as follows, was thereupon received in evidence and marked Defendant's Exhibit 2.

Defendant's Exhibit No. 2.**"ORDINANCE No. 275.**

Adopting an Official Plat of the Resurvey of Churchill's Addition to the City of Phoenix, Maricopa County, Arizona Territory.

The common Council of Phoenix do ordain as follows:

Section 1. That public interest and necessity demand the adoption of a certain plat entitled: 'Official plat of the Resurvey of Churchill's Addition to the City of Phoenix, [48] Maricopa County, Arizona Territory, being all of the S. E. Quarter (SE. $\frac{1}{4}$) of Section five (5), Township one (1) north, range three (3) east of the Gila and Salt River Base and Meridian, surveyed by S. A. Davidson, City Engineer,' and showing upon said plat the correct position or location, course, width and length of all public streets, avenues, alleys and public ways or places as they now exist upon said official plat. And that the survey of the territory described as aforesaid by S. A. Davidson as the City Engineer of the said City of Phoenix, under an order of said Common Council made and entered of record on the 11th day of November, 1897, be and the same is hereby adopted as and declared to be the official survey of all that tract of Churchill's Addition to the City of Phoenix embraced within the confines and boundaries of said described territory as shown by the aforesaid legal Government subdivision.

Section 2. That the plat of said survey as made from the field-notes be and the same is hereby

adopted as and declared to be an official plat of all that part, portion or area of said City as represented in said addition and covered by said survey; and that the position and location, course, width and length of all streets, avenues, alleys and public ways or places are correctly shown upon said official plat.

Section 3. That all streets, avenues, alleys and public ways or places shown upon said plat, and within the confines and boundaries thereof, are hereby declared to be public and dedicated to public use and benefit at large; subject, however, to the exclusive control, management and supervision of the Common Council of said City in the manner and as provided by law.

Section 4. That all buildings, structures and fences erected, or improvements made, by property owners or others [49] along the lines or course of said avenues, streets, alleys and public ways or places as shown upon said plat, shall be erected or made so that the same shall not encroach upon any of the said streets, avenues, alleys, public ways or places as designated by said boundary lines and said official plat, or in any manner interfere with the public use thereof.

Section 5. Any violation of or non-compliance with this ordinance, or any Ordinance of said City of Phoenix, relating to or concerning any official plat of the streets, avenues, alleys, sidewalks or public ways or places, as well as any grade thereof, shall constitute a misdemeanor, punishable by judgment not exceeding \$300, which said judgment may be enforced and collected in the same manner as the judg-

ment in a civil action; or by imprisonment in the city jail of Phoenix for the time allowed by law at the rate of one day's imprisonment for every dollar of fine unpaid; or partly as a judgment in a civil action and partly by imprisonment as aforesaid, provided, that such judgment shall be enforced and satisfied but once by any or all of said methods.

Section 6. That said plat be duly filed for record in the office of the County Recorder of Maricopa County, Arizona Territory.

Passed by the Common Council of the City of Phoenix this 7th day of September, 1898.

Approved this 7th day of September, 1898.

Attest: T. A. JONES,
City Recorder.

J. C. ADAMS,
Mayor."

Thereupon defendant in connection with said ordinance offered in evidence the map to which said ordinance referred, which was received in evidence marked Defendant's Exhibit 2 and filed. [50]

Thereupon defendant offered and read in evidence Ordinance No. 192 of the City of Phoenix, which is as follows:

"ORDINANCE No. 192.

An ordinance annexing to the City of Phoenix, in the County of Maricopa, Territory of Arizona, the land, property and territory, situated, lying and being in said County and Territory, to wit: The Southeast quarter ($\frac{1}{4}$) of section five (5), in township one (1) north, range three (3) east of Gila and Salt River Base and Meridian. Whereas, a pe-

tion has been filed with the City Recorder, and the Common Council of the City of Phoenix, signed by the owners of more than one-half in value, according to the last assessment in Maricopa County, of the land, property and territory in Maricopa County, Territory of Arizona, hereinafter mentioned, to wit: The southeast quarter ($\frac{1}{4}$) of section five (5), in township one (1) north, range three (3) east, Gila and Salt River Base and Meridian, according to the United States survey, and commonly known as the Churchill's addition, to the City of Phoenix, and lying contiguous thereto, and not embraced within its limits, and asking that said tract of land, property and territory, be annexed to said city in conformity with the provisions of Section one, of an Act entitled 'An act authorizing incorporated cities to extend and enlarge their limits,' approved April 12th, 1893.

Now, therefore, the Common Council of Phoenix do ordain as follows:

Section 1. That the said property and tract of land and territory, hereinbefore mentioned, and described, be, and the same is hereby annexed to, made a part of, and included within the corporate limits of the City of Phoenix, County of Maricopa, Territory of Arizona, and the same, and every part thereof, shall hereafter be a part and parcel [51] of said city for all purposes whatsoever.

Sec. 2. This ordinance shall be in force and effect from and after its passage and publication according to law.

Passed by the Common Council this 27th day of February, A. D. 1895.

Approved the 27th day of February, A. D. 1895.

Attest: ED SCHWARTZ,

City Recorder.

J. D. MONIHON,

Mayor."

Thereupon defendant offered Ordinance No. 193 and upon order of the Court read the portion thereof referring to Van Buren Street, which is as follows:

"ORDINANCE No. 193.

Section 1. That the grade of Center Street from Van Buren Street to the Center of Jackson Street shall be and is now hereby established, and declared to be as follows:

Beginning at the center of Center Street, at its intersection with Van Buren Street, at an elevation of 97.200 feet above the established datum plane (assuming the reference point indicated on a stone, at the northwest corner of the City Hall plaza, to be 98.225 feet above datum plane). Thence along the center of Center Street, on a uniform grade, to a point midway between Van Buren and Monroe Streets, 97.500 feet above said datum plane; thence along the center of Center Street on a uniform grade, to a point in the center of Monroe Street, which point is 97.500 feet above datum plane; thence along the center of Center Street, on a uniform grade, to a point at the center of Adams Street, which point is 97.300 feet above datum plane; thence along the center of Center Street, on a uniform grade, to a point midway between Adams and Washington Streets, which point is 97.300 feet above datum plane; thence along the center of Center Street, on

a [52] uniform grade, to the center of Washington Street, to a point which shall be 97.200 feet above datum plane; thence along the center of Center Street, on a uniform grade, to a point midway between Washington Street and Jefferson Street, which point shall be 97.200 feet above datum plane; thence along the center of Center Street, on a uniform grade, to the center of Jefferson Street, which point shall be 97.140 feet above datum plane; thence along the center of Center Street, on a uniform grade, to a point where the center line of the alley would intersect said center line of said Center Street, which point shall be 96.000 feet above datum plane; thence along the center of Center Street, on a uniform grade, to the center of Madison Street, which point shall be 95.200 feet above datum plane; thence along the center of Center Street, to a point where the center line of the alley between Madison and Jackson Street would intersect the center line of Center Street, on a uniform grade, which point shall be 93.000 feet above datum plane; thence along the center of Center Street on a uniform grade, to the center of Jackson Street, which point of intersection shall be 91.400 feet above datum plane.”

Thereupon defendant introduced section 6 of Ordinance 426 of the City of Phoenix, passed March 22, 1909, reading as follows:

“Section 6. In the portion of Churchill’s Addition known as Lount Tract, the southwest block shall be known as Block 1, the Northwest block as Block 2, the Northeast block as Block 13, and the Southeast block as Block 14. The block south of Block 17

shall be known as Block 16, and the block south of Block 16 as Block 15, and the block south of Block 27 shall be known as Block 28.”

Thereupon defendant offered map dated May 26th, 1892, being the plat survey of Churchill's Addition to the City of [53] Phoenix, which was received in evidence marked Defendant's Exhibit 3, and filed in the case. Thereupon defendant offered in evidence certified copy of deed from Hattie L. Mosher to Julia A. Lount, which certified copy of deed was received in evidence, marked Defendant's Exhibit 4, and filed; also certified copy of deed of Julia A. Lount, widow, to W. W. Mouer, dated February 4th, 1904, which was received in evidence, marked Defendant's Exhibit 5, and filed; also certified copy of warranty deed from Hattie L. Mosher, widow, to Julia W. Mosher, single, which was received in evidence marked Defendant's Exhibit 6, and filed; also certified copy of decree of distribution in the matter of the estate of Julia A. Lount, deceased, decree signed October 22d, 1908, which was received in evidence marked Defendant's Exhibit 7, and filed; also certified copy of realty mortgage from William B. Lount, Carrie A. Lount, and Hattie L. Mosher to Katie F. Young, which was received in evidence and marked Defendant's Exhibit 8 and filed; also certified copy of lease, dated December 23, 1908, from William B. Lount and Hattie L. Mosher to J. B. Hocker, which was received in evidence and marked Defendant's Exhibit 9, and filed; also certified copy of agreement between William B. Lount and Hattie L. Mosier, which was introduced in evi-

dence, marked Defendant's Exhibit 10, and filed; also certified copy of special power of attorney from Hattie L. Mosher, widow, to William B. Lount, which was received in evidence marked Defendant's Exhibit 11, and filed; also certified copy of realty mortgage, William B. Lount and Carrie A. Lount and Hattie L. Mosher by William B. Lount, her attorney in fact, to Phoenix Savings Bank & Trust Company, which was received in evidence marked Defendant's Exhibit 12 and filed; also certified copy of special power of attorney from Hattie L. Mosher, a widow, to William B. Lount, which was received in evidence and marked Defendant's Exhibit 13 and filed; also certified copy of realty mortgage from William B. Lount, Carrie A. Lount, his wife, [54] and Hattie L. Mosher, a widow, by William B. Lount, her attorney in fact, to Phoenix Savings Bank & Trust Company, which was received in evidence and marked Defendant's Exhibit 14, and filed; also certified copy of special power of attorney from Hattie L. Mosher to William B. Lount, which was received in evidence, marked Defendant's Exhibit 15, and filed; also realty mortgage from William B. Lount, Carrie A. Lount, his wife, and Hattie L. Mosher, by William B. Lount, her attorney in fact, to Phoenix Savings Bank & Trust Company, which was received in evidence, marked Defendant's Exhibit 16, and filed; also lease by William B. Lount to W. E. Ferguson and Peter Mohn, received in evidence, marked Defendant's Exhibit 17, and filed; also certified copy of mortgage by Hattie L. Mosher to Paola Perazzo, which was received in evidence,

marked Defendant's Exhibit 18, and filed; also realty mortgage executed by William B. Lount and Carrie A. Lount, his wife, and Hattie L. Mosher, widow, to Phoenix Savings Bank & Trust Company, which was received in evidence, marked Defendant's Exhibit 19, and filed. All of said exhibits, numbered 4 to 19, inclusive, were received in evidence over objection of counsel for plaintiffs.

Testimony of Clarence Standage, for Defendant.

CLARENCE STANDAGE, a witness called on behalf of the defendant, being first duly sworn, testified as follows, on direct examination:

I am clerk of the Board of Supervisors of Maricopa County. I have in my hand minute record of the Board of Supervisors No. 1. On page 2 is a record of the minutes of the Board of Supervisors of March 18th, 1871, which reads as follows, in part:

"Ordered that all section lines in this county be, and they are hereby, declared to be highways, and that said roads or highways be four rods wide, that is to say, 33 feet on each [55] side of said line, and that said roads shall be open by order of the board of supervisors whenever they shall deem it expedient."

I also have a record of the minutes of the Board of Supervisors dated May 15th, 1871, which reads in part as follows:

"Ordered that the public highway be open, commencing at the Northeast corner of Section 8, running thence west on the north line of said section north of Phoenix."

I have checked it with the map.

Testimony of H. R. Patrick, for Defendant.

H. R. PATRICK, called as a witness on behalf of defendant, being duly sworn, testified as follows on direct examination:

My name is H. R. Patrick. My business is that of civil engineer and surveyor. I reside in the suburbs outside the limits of Phoenix and have lived in this valley a little over forty-one years. I know the tract formerly known as the Lount Tract. When I came here it was known as the King-Woolsey place, the entire Southeast quarter of Section 5, and my recollection is that he had ten acres platted off for his wife as a sort of homestead. That was known then as the Woolsey homestead tract, and later it was acquired by Doctor Conyers and was called at that time the Conyer's Ranch. That was the Conyers that conveyed to Lount. During the time Conyers owned it, I was called on by Doctor Conyers to lay out the front line of his property—that is the south side along what is now Van Buren Street—and I made a survey of it. First, I posted a block at the southeast corner of section 5 and stationed my instrument at the quarter corner between section five and section eight, which is the southwest corner of the quarter-section—southwest corner of the southeast quarter-section—and would be at the intersection of [56] the center line of Center Street and the center line of Van Buren Street, quarter section corner. From that point I ran the line to establish the section line between Section 8 and Section 5, and then at the proper

(Testimony of H. R. Patrick.)

point, using the legal description of the part that was being conveyed to Doctor Conyers. I set off the 33 feet for the county road on the north side of the section line. I laid off that line 33 feet north of the section line from the quarter-section corner east to the southeast corner of the Conyer's tract. That embraced the same property afterwards known as the Lount Tract, and I located the south line of the Lount Tract 33 feet north of the section line between 5 and 8. The line extended from Center Street into what is now Second Street and along the present block lines or lot lines, I think, of the tracts as they are now subdivided. When I made that survey there was no fence on the section line. There was an old fence along what we call the north side of Van Buren Street at that time, which was a barb-wire fence of rather small mesquite posts, lying to the north of the section line, but the fence was not exactly straight on any side of the tract. There was nothing on the section line that struck my view in looking through from corner to corner. That kind of fence was there on the north side of the street at the proper width at the time I made the survey. In 1887 I lived for a short time on East Van Buren Street on the south side of the street opposite this Lount Tract. Later on I roomed at the southeast corner of what is now First Street and Van Buren. At that time the street between Second Street and Center Street was traveled by pedestrians and all kinds of vehicles.

(Testimony of H. R. Patrick.)

On Cross-examination.

At the time I spoke of, the latter part of 1887, the street was traveled apparently the width that it is now. [57] I recall a sketch of the street as it was in 1885, made by Mr. Dyer. (Indicating Plaintiff's Exhibit "C.") I should not say it was technically correct as we would state from an engineering standpoint. It was not taken from measurements or any survey on the ground. I would not say that in 1887 the street was traveled over as it is now, but it was traveled by pedestrians and vehicles of certain kinds over all parts of it. I do not remember seeing any garden or any ornamental shade trees within the full width of the street, 33 feet each side. There were mulberry trees in the yard on the north side of the street, but not included in the 33 feet laid out as county road. I also surveyed the Barnum lot and they established their fence by my survey. My recollection is that the old original wire fence on the Lount property at the southeast corner of the Lount tract had gone out of line, outside of 33 feet. I knew Mr. Hancock who surveyed and platted the town of Phoenix. He gave me the data by which I finally found and uncovered the Quarter-section corner and section corner between section 8 and 5. (Thereupon the map was offered and received in evidence, marked Plaintiffs' Exhibit 3 and filed.) That is a map of the town of Phoenix (referring to Plaintiff's Exhibit 3) but not a complete map. It doesn't show the section line or section corner at any part of the plat. At the time the City of Phoenix was surveyed,

(Testimony of H. R. Patrick.)

the section corner had been established for several years. I don't know how many fences were built by Mr. Lount on the south side. I think he built a new fence after he acquired the property approximately on the location of the old original fence. The old original fence was 33 feet north of the section line and I do not know whether he built it or whether Doctor Conyers built it, but it was put in about that time. I surveyed the Conyers south line in 1880. [58]

Testimony of Homer A. Turney, for Defendant.

HOMER A. TURNEY, called as a witness on behalf of defendant, being duly sworn, testified as follows on direct examination:

My name is Homer A. Turney. I have lived in Phoenix thirty-one years. My business is civil engineer. I was city engineer of Phoenix beginning in 1902, for about twelve years. I made a survey of the tract of land known as the Lount Tract, for Mr. William B. Lount, a brother of Mrs. Mosher, and one of the plaintiffs in this case. When I became city engineer I began making maps for the general real estate trade, among which was a map of Churchill's Addition. When I was drawing that map, I went to William B. Lount and asked him for his subdivision map of the Lount Tract. He said he had such a map that was made by Sam Davidson, the former city engineer, for S. D. Lount, his father. The next day he told me he was unable to find the map and asked if I could make a survey which would recover the map.

(Testimony of Homer A. Turney.)

He told me that the map had been made by prolonging the exact boundaries of all the streets in Churchill's Addition and the surrounding streets, Van Buren Street and Central Avenue. He said the city engineer had set big block corners at all of the blocks and that if I went into the field, I would find these block corners. I went into the field with my instruments and prolonged all the boundary streets and intersecting streets on exact straight lines of those streets and I did find the block corners as he had described and marked in the manner he had described. I then measured the blocks and found they conformed exactly with the blocks in the Churchill Addition. I then, under that subdivision of the map of the Churchill Addition, as city engineer, gave those block numbers and those lots numbers in accordance with the Ordinance which was read in testimony this morning. Some time after that a customer came to my office and asked me [59] to survey a lot in the Lount Tract, saying he had been sent by Mr. W. B. Lount and that he had a correct map to be followed in making subdivision surveys in that tract. I then went to work and staked out that land and staked out lots two other times, and the customers stated to me they were sent by Mr. Lount. Later Mr. Lount asked me to make a survey of one lot in that tract and I made such survey on the 21st of May, 1913, surveying the lot at the northeast corner of Polk Street and First Street and Mr. Lount paid the bill for doing so. I did not look for the corners of the block in Van Buren Street, but could tell from

(Testimony of Homer A. Turney.)

may survey that the lines of this block conformed to the present Van Buren Street exactly.

On Cross-examination.

I don't know for what purpose the survey which I made for Mr. Lount in 1913 was made.

On Redirect Examination.

I am familiar with the official plat of Churchill's Addition, the drawing of the map being done by a man in my employ and under my supervision. On that map (indicating) the line drawn between the quarter-section corner and the section corner marks the section line and the part at which the words "Van Buren Street" appear, lies north of the section line and is 33 feet in width. I am familiar with the streets in the City of Phoenix and I don't recall any street that is 66 feet in width, except it be a street on a section line.

Testimony of George Kirkland, for Defendant.

GEORGE KIRKLAND, called as a witness on behalf of defendant, being sworn, testified as follows on direct examination:

My name is George Kirkland and I am deputy city assessor and tax collector of the City of Phoenix. The tax rolls are made up in my office. I have a record taken from the tax roll and maps in my office from 1906 down to date, [60] which includes the portion of the tax roll relating to the property owned by Mrs. Mosher, her daughter and William B. Lount. That property is described on the rolls as lots and blocks in the Churchill Addition. The record I have

(Testimony of George Kirkland.)

with me comprises merely four blocks in the Churchill Addition. There are assessments upon a portion of what is now Van Buren Street, but no assessments upon the street itself. I have a map used in the assessment of the property from which we make these records (producing map). The property in question is indicated as Blocks 1 and 14 of the Churchill's Addition. This map was made in 1907 and used in 1910, 1911 and 1912.

On Cross-examination.

I have been in office for six years. They ceased assessing this property as a solid body by acreage when the blocks were subdivided in 1909 and 1910. The method of collecting taxes is practically the same, except that prior to that time it was known as the Lount Tract and after that time it was known as Block so and so of the Churchill Addition. There was a change in valuation after this change. It was increased one time and then it was decreased. They did pay more taxes because it was not assessed in acre tracts. It was known as the North and South Half of Block One and the North and South Half of Block 14. It was a solid piece of property known as the Lount Tract in that it had streets all around it, but it wasn't assessed in one piece. The city made the change and subdivided the blocks for their own convenience. I do not know that Mr. Lount and Mrs. Mosher protested against that form of assessment and asked that the assessment of the entire acreage be made as formerly. It was assessed as blocks after it was laid out in blocks. Before that it was

(Testimony of V. A. Thompson.)

assessed as one tract, I presume, but I have no knowledge of it as that was prior to my time. [61]

Testimony of V. A. Thompson, for Defendant.

V. A. THOMPSON, called as a witness on behalf of the defendant, being sworn, testified as follows on direct examination:

My name is V. A. Thompson and I am City Manager of the City of Phoenix. Prior to becoming City Manager I was superintendent of streets, being first appointed January 15th, 1915. I have been familiar with the streets of the city since that time. I have known Van Buren Street between Center Street and Second Street for about seventeen years. There has been no change in the width of the street during that time that I know of. The street has been graded frequently and sprinkled very often ever since for the full width of the roadway is as the roadway at the present time. I have never received any protest from anybody with reference to the use of the street by the city during that time.

On Cross-examination.

During the seventeen years I have spoken of, and during the time I was superintendent of streets, I never interfered in any way with the work that the plaintiffs in this case did on the streets and sidewalks. I do not know whether they put in sidewalks or filled up the spaces in the street.

Redirect Examination.

Private owners frequently lay sidewalk along their property.

Testimony of Otto Kitchen, for Defendant.

OTTO KITCHEN, called as a witness on behalf of the defendant, being sworn, testified as follows on direct examination :

My name is Otto Kitchen. I am chief of surveying party of the City of Phoenix. (Referring to the description of the land appearing in Exhibit 7.) I have taken that description and determined the south line of the property described, and as it stands now, the building on the northeast corner [62] of Central and Van Buren is exactly on the property line 33 feet north of the section line.

Testimony of Lytton B. Hitchcock, for Defendant.

LYTTON B. HITCHCOCK, called as a witness on behalf of the defendant, being duly sworn, testified as follows on direct examination :

My name is Lytton B. Hitchcock. I am city engineer and superintendent of streets of the City of Phoenix. The nature of the improvement contemplated along Van Buren Street between Center Street and Second Street is to pave the roadway 40 feet in width. According to our records with reference to the section line, the paving would be approximately in the Center of the Street and the center line of the paving would be within nine inches of being north of the section line. The center line of the paving would be north of the property line of the Lount property 32.25 feet. The Lount property would be 32.25 feet north of the center line of the improvement. The improvement would terminate 12 feet and 3 inches

(Testimony of Lytton B. Hitchcock.)

from the property line. That would be the curb line and would be the same from the property line on the south side.

Testimony of J. A. Porterie, for Defendant.

J. A. PORTERIE, called as a witness on behalf of the defendant, being duly sworn, testified as follows on direct examination:

My name is J. A. Porterie. I live at 135 East Van Buren Street and have lived there since 1881. I recall the fence along the Lount property on the south. I do not recall where the fence was with reference to the section line. The fence with reference to the present street was in the same position where it is now, but it was a different fence. But if I remember right, this fence is now in the same position where the other was.

On Cross-examination.

I am referring to the fence on the south side of the [63] Lount tract, except it was continued from what they called Second Street up to Center Street. First Street did not run north into the Lount Tract at that time. The fence was continued all along that line, that is running west. I had a fence there in 1885. My fence was about ten feet probably north of my front on the north side. And I measured 137½ feet from the corner of the alley and fenced in part of the street which I had a right to because those lots were 137½ feet. I fenced in my own property. It is Van Buren Street now—that is people traveled it, but it belongs to my lot. It is not fenced in now

(Testimony of J. A. Porterie.)

but it was fenced in with willow trees and it left a very narrow road. In 1881, when I moved there, there was a narrow passageway. It wasn't used as a roadway or street on account of the section line being closed up west of Center Street north of the school-house. Teams used to go down from Five Points to Monroe and go around by way of Monroe to Second Street and turn that way on to Tempe. The street wasn't traveled very much, except an occasional Mexican came in with a load of wood or some farmer. I don't think there was much change between 1881 and 1885. I built the first house on the front there between First Street and Second Street, because the street was considered all back lot then—the alley was the front part of that half block and the street where it is now was considered the back yard. I don't know how many years it was considered a back yard. Things have grown so I have lost track of what took place. I remember when the street-car was put down, but I don't recollect anything about Mrs. Lount and Mrs. Mosher having part of the street in cultivation. There was a row of mulberry trees about ten or twelve feet north of their fence, and I believe some rose-bushes in the ditch there where the trees were planted, and those trees were cut down and substituted by ash trees that [64] have grown since, but if that garden was there, I have no recollection. I should judge it was about sixty feet, more or less, between my fence and the Lount fence. I am still living in the place and my front is on Van Buren Street and not on the alley, but in the early days I

(Testimony of J. A. Porterie.)

lived in the alley altogether. I cannot say when Van Buren Street began to be traveled. I have forgotten the dates.

REBUTTAL.

Plaintiff thereupon offered in evidence declaratory statements showing that the property in question had been segregated from Government property on January 10th, 1871. The same was received in evidence over the objection of defendant, marked Plaintiffs' Exhibit "D" and read into the record as follows:

"Department of the Interior, United States Land Office, Phoenix, Ariz.

November 21, 1919.

To Whom It May Concern: I hereby certify that the records of this office show the Pre-emption Declaratory Statement 97 was filed January 10 (or 16) 71 and Apr. 21, 71 by Daniel Troomey for the SE.1/4, section 5, Tp. 1 N., R. 3 East G. and S. R. Mer. Entry No. 45 was made Jan. 2, 74.

SCOTT WHITE,
Receiver."

Testimony of Hattie L. Mosher, for Plaintiff (in Rebuttal).

HATTIE L. MOSHER, called as a witness in rebuttal, testified as follows:

Referring to why the descriptions in the various statements offered in evidence by the defendant were, some by metes and bounds and some by blocks and lots, I would say that the metes and bounds were used

(Testimony of Hattie L. Mosher.)

when it had to be legal and accurate and we refer to lots and blocks purely as a matter of convenience for ourselves. We had to call them something. The mortgage on the house I live in for \$3,500.00 was given by metes and bounds, and was given with a right of way in case the [65] mortgage was never paid. He was given a right of way over ground that was necessary to reach it. We used the lots and blocks as a matter of our own personal convenience. The decree of distribution described the property by blocks and that was according to an arrangement we had with ourselves.

Testimony of A. S. Mills, for Plaintiffs (Recalled in Rebuttal).

A. S. MILLS, called as a witness in rebuttal, testified as follows:

Referring to the fence, which on direct examination I testified to, as having been maintained by Mr. Lount on the south side of the Lount property in Van Buren Street. I had occasion, one time very particularly, to have my attention called to it. Mr. Lount asked me to walk out with him to the front gate to show me where he called the line and showed me the line of the fence. We noticed quite particularly about the distance there was between his fence and Porterie's fence. There was a fence there and it was about the middle of what is now the present street or about 25 feet from Mr. Porterie's fence which was seven or eight feet in front of his house. That would be about the middle of the street. [66]

Plaintiff's Exhibit "A."

Deed from B. L. Conyers and Isabel Conyers, his wife, to Samuel D. Lount, dated September 21st, 1881, recorded September 21st, 1881, in Book 7 of Deeds, page 32, Records of Maricopa County, Arizona, covering the following described property in Maricopa County, Territory of Arizona:

"That portion of the West Half (W. $\frac{1}{2}$) of the Southeast Quarter (SE. $\frac{1}{4}$) of Section Number Five (5), Township One (1) north of Range Three (3) east of the district of lands subject to sale at the Land Office at Florence, Territory of Arizona, same particularly described as follows:

Commencing at the intersection of Van *Burden* and Center Streets of *sd* City of Phoenix on the east side of Center Street and thenorth side of Van Buren Street and running thence east along the line of said Van Buren Street Seven Hundred Fifty-four feet to a post; thence north Seven Hundred Fourteen (714) feet to a post; thence west Seven Hundred Sixty-one feet to a post; thence south Seven Hundred Twelve feet to the place of beginning; all the said land being situate in the County of Maricopa, Territory of Arizona." [67]

Defendant's Exhibit No. 1.

Petition and Protest to the Mayor, Commissioners, and City Manager of the City of Phoenix.

We, the undersigned property owners of Van Buren Street, holding property between Second Street and Central Avenue, most respectfully petition your Honorable Body to cut out the street facing

our respective properties from the paving district embodied in the petition now before you, asking that Monroe and Van Buren Streets be paved from Second Street to Center Street, and that North First Street be paved from Adams Street to Van Buren Street.

We, the undersigned, most respectfully protest against any paving being done on Van Buren Street between North Second Street and North Central Avenue, at the present time, as we believe that the best interests of this street will be served by waiting until the canal question is settled, and a way is provided to insure the paving over the canal where it crosses, and runs, in Van Buren Street for a distance of a block and a half.

	Number of feet owned.
Signed :	
P. E. Hickey for Mrs. Leach.	
(Signed) Mrs. E. N. Leach	
By P. K. Hickey.....	100
A. J. Porterie.	
(Signed) J. A. Porterie.....	50
W. B. Lount.	
(Signed) W. B. Lount.....	300
Hattie L. Mosher.	
(Signed) Hattie L. Mosher.....	150
Julia Collins.	
(Signed) Julia Collins—By Hattie L. Mo-	
sher	150
	<hr/>
	750 feet.

Total length in Van Buren Street.....1170

Not wanting paving at present.....: 750

Indifferent (John Gregg)..... 50

Total length not signed up..... 800

Wanting paving at once..... 370

Total length.....1170

[69]

Defendant's Exhibit No. 4.

Warranty deed, dated January 8th, 1903, recorded December 8th, 1903, Book 63 of Deeds, page 437, Records of Maricopa County, Arizona, from Hattie L. Mosher, widow, to Julia A. Lount, of following described property:

“All grantor’s interest in the estate of S. D. Lount, deceased, by reason of her being an heir, legatee, and devisee under the last will and testament of said S. D. Lount, deceased, also the east Half (E.1/2) of the block of land in the Churchill Addition to the City of Phoenix, County of Maricopa, Territory of Arizona, bounded on the north by Polk Street, on the east by First Street, on the south by Van Buren Street and on the west by Center Street. Also an undivided one-eighth interest in the business and property of S. D. Lount & Son, all of the above property situated in Maricopa County, Territory of Arizona.”

Defendant's Exhibit No. 5.

Deed from Julia Lount, widow, to W. W. Moore, dated February 4th, 1904, recorded March 8th, 1904, Book 65 of Deeds, page 391, Records of Maricopa County, Arizona, covering the following described property:

“Beginning at a stone monument located at the intersection of First and Taylor Streets in Churchill's Addition to the City of Phoenix, said stone monument being sixteen and eighty-four one-hundredths (16.84) feet west of the Center line of First Street in said Churchill's Addition and thirty (30) feet south of the north line of Taylor Street in said Churchill's Addition running thence southerly on a line with the street intersection stone monument at the intersection of [70] First and Van Buren Streets, one hundred and seventy (170) feet thence easterly sixty-eight and twenty-eight one-hundredths (68.28) feet on a line parallel to the section line on the north side of section eight (8), Township one (1) north, Range Three (3), East Gila and Salt River Base and Meridian to a stake at the northwest corner of the tract of land herein conveyed thence continuing easterly on this same line one hundred and forty (140) feet to a stake, thence southerly on a line parallel to a line connecting the stone monuments hereinbefore mentioned fifty (50) feet to a stake thence westerly on a line parallel with the above-mentioned section line one hundred and forty (140) feet to a stake, thence northerly on a line parallel to the east line of said tract fifty (50) feet to

the above-mentioned stake at the northwest corner of said tract hereinbefore mentioned containing sixteen one-hundredths (.16) of an acre more or less, together with a Right of Way of one hundred (100) feet in width on the west of said tract extending from Van Buren Street to Taylor Street for the purpose of ingress and egress from said tract and the Right of Way on the East of said Tract twenty (20) feet in width, extending northerly to Taylor Street for the said purpose of ingress and egress, being a portion of the Lount Tract of the City of Phoenix."

Defendant's Exhibit No. 6.

Warranty deed, Hattie L. Mosher, widow, to Julia W. Mosher, single, dated April 30th, 1908, recorded June 26th, 1908, Book 80 of Deeds, page 637, Records of Maricopa County, Arizona, covering the following described property:

"All of the East Half (E. 1/2) of that block of land in Churchill's Addition to the City of Phoenix, Maricopa County, Arizona, bounded on the north by Polk Street, on the east by First Street, on the south by Van Buren Street and on the west by Center Street."
[71]

Defendant's Exhibit No. 7.

Decree of distribution in estate of Julia A. Lount, deceased, recorded in the office of the Recorder of Maricopa County, Arizona, November 9th, 1908, Book 13 of Miscellaneous Records, page 151, distributing said estate as follows:

"1. All of the east one-half of Block One (1) Churchill's Addition to the City of Phoenix, Mari-

copa County, Arizona, to Julia W. Mosher.

2. Of the undivided one-half-interest in a certain lot of ice-making machinery located in a building on the northeast corner of Washington and Fourth Sts., in the city of Phoenix, Maricopa County, Arizona, and of the undivided one-half interest in Lots Seven (7), Eight (8), Ten (10), and Twelve (12), in Block Seventeen (17) of the City of Phoenix, Maricopa County, Arizona, belonging to the estate of Julia A. Lount, deceased, five-eighths to Hattie L. Mosher and three-eighths to William B. Lount.

2. Of the undivided three-fourths interest in the west half of Block One (1) Churchill's Addition to the City of Phoenix, Maricopa County, Arizona.

Of the undivided three-fourths interest in Block Two (2) of Churchill's Addition to the City of Phoenix, Maricopa County, Arizona.

Of the undivided three-fourth interest in Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 14 in Block 13 of Churchill's Addition to the City of Phoenix, Maricopa County, Arizona.

And of the undivided three-fourths interest in Lots 3, 5, 7, 9 and 11 in Block 59 of the City of Phoenix, Maricopa County, Arizona.

All belonging to the estate of Julia A. Lount, deceased, an undivided two-thirds to Hattie L. Mosher, and an undivided [72] one-third to William B. Lount.

4. All the remaining property belonging to said estate to Julia A. Lount, deceased, whether real, personal or mixed, to Hattie L. Mosher and William B. Lount, share and share alike. So far as now known,

the remaining property of said estate consists of the following described real property, to wit:

Lots 11 and 12 in Block 14 of Churchill's Addition to the City of Phoenix, Maricopa County, Arizona.

Lots three (3) in Block Four (4) Montgomery's Addition to the City of Phoenix, Maricopa County, Arizona.

The East half of the northwest quarter of Section 31, Twp. 2 North, Range 1 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona.

Also beginning at the northwest corner of Section thirteen, Township One North, Range Five East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, running thence east one hundred and fifty-three rods; thence south one hundred and fifty rods; thence west twenty rods; thence south to the South Boundary line of the North one-half of said Section Thirteen; thence west along said South boundary line to the West Boundary line of said Section; thence north along said West boundary line to the place of beginning. Subject to all canal and reservoir contracts now thereon, together with one and three-quarter water rights in the Highland canal. Also, the South one-half of the Southwest quarter and the Southwest quarter of the Southeast quarter and the Northeast quarter of the Southwest quarter of Section One (1) Township One (1) North, Range Five (5) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona." [73]

Defendant's Exhibit No. 8.

Realty Mortgage, William B. Lount, Carrie A. Lount, wife of William B. Lount, and Hattie L.

Mosher, to Katie F. Young, dated November 9th, 1908, recorded November 14th, 1908, Book 61 of Mortgages at page 494, Records of Maricopa County, Arizona, covering the following property:

The real estate lying and being in the County of Maricopa and Territory of Arizona and known and described as that portion of the west one half (W. $\frac{1}{2}$) of the Southeast Quarter (SE. $\frac{1}{4}$) of Section five (5) township one (1) North of Range Three (3) East of Gila and Salt River Base and Meridian, described as follows:

Commencing at the intersection of Van Buren Street and Center Street at the quarter-section corner between sections five and eight in Township one north of Range three east of the Gila and Salt River Base and Meridian running thence east forty nine and twenty one hundredths feet, thence north thirty three feet to point of beginning, said point being at the northeast corner of the intersection of Center Street and Van Burden Street, thence north along the east line of said Center Street the distance of seventy five feet, thence east one hundred and thirty five feet, thence south seventy five feet, thence west one hundred and thirty five feet to point of beginning.

Defendant's Exhibit No. 9.

Lease, W. B. Lount and Hattie L. Mosher to J. B. Hocker, dated December 23d, 1908, recorded January 5th, 1909, Book 3 of Leases, page 615, Records of Maricopa County, Arizona, covering the following property: [74]

“That certain building located on Lot One (1) in Block One (1) of the Lount Tract in Churchill Addition to the City of Phoenix, County of Maricopa, Territory of Arizona, and situated on the northeast corner of Center and Van Buren Streets in the City of Phoenix, County of Maricopa, Territory of Arizona, and fronting fifty (50) feet on Center Street and one hundred and thirty-five (135) feet on Van Buren Street, now occupied by party of the second part as a livery stable, together with certain sheds on Lot Two (2) of Block One (1) of said Lount Tract, and used in connection with said livery-stable.”

Defendant's Exhibit No. 10.

Agreement between W. B. Lount and Hattie L. Mosher, dated January 2d, 1909, recorded February 6th, 1909, Book 3 of Agreements, page 421, Records of Maricopa County, Arizona, covers agreement concerning following property:

“A portion of Block Fourteen Churchill's Addition; Lots One (1), Two (2), Three (3), Five (5), Six (6), Seven (7), Twelve (12), and Fourteen (14), in Block Thirteen (13), of Churchill's Addition to the City of Phoenix; Lots One (1), Two (2), Three (3), Four (4), Five (5), and Six (6), Block One (1) of Churchill's Addition; Block Two (2) of Churchill's Addition to the City of Phoenix, Lots Eight (8), Nine (9), Ten (10) and Eleven (11) in Block Thirteen (13) of Churchill's Addition; Lots Three (3), Five (5), Seven (7), Nine (9), and Eleven (11) in Block Fifty-nine (59) of the City of Phoenix,

and Lot Three (3) in Block Four (4) Montgomery's Addition to the City of Phoenix, known as the Mowrey Place." [75]

Defendant's Exhibit No. 11.

Special Power of Attorney, Hattie L. Mosher, a widow, to W. B. Lount, dated February 27th, 1909, recorded December 29th, 1909, Book 3 of Powers of Attorney, page 609, Records of Maricopa County, Arizona, granting power to deal with the following described real estate:

Lots 5 and 6, Block 1, Lots 1, 2, 3, 5, 6, 7, 12 and 14, Block 13, Churchill's Addition to the City of Phoenix, County of Maricopa Territory of Arizona, also Lot 3, Block 4, Montgomery's Addition to said City of Phoenix; also the NW. $\frac{1}{4}$ Sec. 13, Tp. 1 N., R. 5 E., and S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ & NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ Sec. 1, Tp. 1 N., R. 5 E., and E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ Sec. 31, Tp. 2 N., R. 1 E., all in Maricopa County, Territory of Arizona, G. & S. R. B. & M., also lots 7, 8 and 10 & 12, Block 17 in said City of Phoenix, and Lot 1, Block 2, and W. 140 feet of Lot A, Block 2 RR Place, Sub. Div. of Murphy's Addition to said City of Phoenix."

Defendant's Exhibit No. 12.

Realty Mortgage, W. B. Lount, Carrie A. Lount, his wife, and Hattie L. Mosher, a widow, by W. B. Lount, her attorney in fact, to the Phoenix Savings Bank & Trust Company, dated January 10th, 1911, Recorded January 10th, 1911, in Book 70 of Mortgages, page 214, Records of Maricopa County,

Arizona, covering the following described property.

“The following real estate lying and being in the County of Maricopa and Territory of Arizona, and known and described as Commencing at the Southeast corner of Central Avenue and Polk Street in the City of Phoenix, and running thence South one hundred (100) feet; thence east one hundred and thirty-five (135) feet, thence North one hundred (100) feet to Polk [76] Street, thence west one hundred thirty-five (135) feet to the place of beginning, said described land being known as lots 5 and 6 in Block 1 of Churchill’s Addition to the City of Phoenix, according to an unrecorded plat thereof.”

Defendant’s Exhibit No. 13.

Special Power of Attorney, Hattie L. Mosher, a widow, to W. B. Lount, dated May 9th, 1912, recorded June 26th, 1912, in Book Four, Powers of Attorney, page 81, Records of Maricopa County, Arizona, granting power to deal with the following real estate:

“All of Block Fourteen (14) and Lot Four (4) in Block One (1), Churchill’s Addition to the City of Phoenix, County of Maricopa, State of Arizona.”

Defendant’s Exhibit No. 14.

Realty Mortgage, W. B. Lount, Carrie A. Lount, his wife, and Hattie L. Mosher, a widow, by W. B. Lount, her attorney in fact, to Phoenix Savings Bank & Trust Company, dated June 26th, 1912, recorded June 26th, 1912, in Book 76 of Mortgages, at page 295, Records of Maricopa County, Arizona, covering the following described property:

“The following real estate lying and being in the County of Maricopa and State of Arizona, and known and described as Commencing at the Northeast corner of Van Buren and First Streets, in the City of Phoenix, and running north on First Street one hundred (100) feet, thence east one hundred forty (140) feet, thence south one hundred (100) feet, thence west on Van Buren Street one hundred forty (140) feet to place of beginning; said described land being known as lots one (1) and [77] two (2) in block (14) of Churchill’s Addition to the City of Phoenix, according to an unrecorded plat thereof.”

Defendant’s Exhibit No. 15.

Special Power of Attorney, Hattie L. Mosher, widow, to W. B. Lount, dated September 14th, 1912, recorded November 8th, 1912, in Book Four of Powers of Attorney, page 94, Records of Maricopa County, Arizona, granting power to deal with the following property:

“Lots one (1), two (2), three (3) and four (4), Block one (1), Churchill’s Addition to the City of Phoenix, County of Maricopa, State of Arizona.”

Defendant’s Exhibit No. 16.

Realty Mortgage, W. B. Lount and Carrie A. Lount, his wife, and Hattie L. Mosher, a widow, by W. B. Lount, her attorney in fact, to Phoenix Savings Bank & Trust Company, dated November 8th, 1912, recorded November 8th, 1912, Book 83 of Mortgages, page 151, Records of Maricopa County, Arizona, covering the following property:

“The following real estate lying and being in the County of Maricopa, and State of Arizona, and known and described as: Commencing at a point one hundred (100) feet south of the southeast corner of Central Avenue, and Polk Street, in the City of Phoenix, and running south seventy-five (75) feet, thence east one hundred thirty-five (135) feet; thence north seventy-five (75) feet, thence west one hundred thirty-five (135) feet to the place of beginning said described land being known as Lot Four (4) and the north one-half of Lot Three (3) in Block One (1) of Churchill’s Addition to the City of Phoenix, according to an unrecorded plat thereof.”
[78]

Defendant’s Exhibit No. 17.

Lease from W. B. Lount to W. E. Ferguson and Peter Mohn, dated November 8th, 1912, recorded November 8th, 1912, Book 4 of Leases, page 170, Records of Maricopa County, covering the following described property:

“A one-story brick building fronting on Central Avenue and running back to the Alley, with a second story addition at the alley and of said building, and covering all of lot four and the north twenty-five feet of Lot Three in Block One of Churchill’s Addition to the City of Phoenix, Arizona. Said building to be occupied by the said parties of the second part as an automobile garage, machine-shop, salesroom and warehouse.”

Defendant’s Exhibit No. 18.

Realty mortgage, Hattie L. Mosher, a widow, to

Paola Perrazzo, dated September 13th, 1916, recorded September 16th, 1916, in Book 101 of Mortgages, page 424, Records of Maricopa County, Arizona, covering the following property:

“The following described premises and property, lying and being in the City of Phoenix, County of Maricopa and State of Arizona, known and described as follows, to wit:

That portion of what is known as the Lount Tract, beginning at a stone monument at the intersection of First and Taylor Streets in Churchill's Addition to the City of Phoenix, said stone being 16.84 feet West of the Center line of First Street in said Churchill's Addition and 30 feet South of the North line of Taylor Street in said Churchill's Addition; running thence southerly on a line parallel with the street intersection stone monument at the intersection of First and Van Buren Streets 170 feet; thence Easterly 68.28 feet on a line parallel to the Section line on the North side of Section 8 in Township 1 North of Range 3 East of the G. & S. R. B. & M., to a [79] stake on the Northwest corner of the tract of land hereby conveyed; thence continuing Easterly on this same line 140 feet to a stake; thence southerly on a line parallel to a line connecting the stone monuments hereinbefore described 50 feet to a stake; thence Westerly on a line parallel with the above mentioned Section line 140 feet to a stake; thence Northerly on a line parallel to the East line of said tract 50 feet to the above mentioned stake at the Northwest corner of said tract herein above mentioned, containing 16/100 of an acre more or less.

Together with right of way 100 feet in width on the West of said tract, extending from Van Buren Street to Taylor Street for the purposes of ingress and egress from the said tract and for the right of way on the East of said tract 20 feet in width extending Northerly to Taylor Street for the purpose of ingress and egress; and together with all rights, privileges and appurtenances thereto in anywise belonging, said property being the same property conveyed to Van I. Jones by W. C. Dawes and Callie M. Dawes, his wife, the record of which conveyance is contained in Book 103 of Deeds at page 328 in the office of the County Recorder of said county and state.”

Defendant's Exhibit No. 19.

Realty Mortgage, W. B. Lount, Carrie A. Lount, his wife, and Hattie L. Mosher, a widow, to Phoenix Savings Bank & Trust Company, dated October 10th, 1916, recorded October 11th, 1916, in Book 102 of Mortgages, page 142, Records of Maricopa County; Arizona, covering the following described property:

“All that certain real estate lying and being in the County of Maricopa, and State of Arizona, known and described as follows, to wit: [80]

Commencing at the southeast corner of Central Avenue and Polk Street in the City of Phoenix, and running thence South one hundred (100) feet, thence East one hundred and thirty-five (135) feet; thence North one hundred (100) feet to Polk Street; thence West one hundred and thirty-five (135) feet to the place of beginning. Said described land being known as Lots five (5) and six (6) in Block one (1) of

Churchill's Addition to the City of Phoenix, according to an unrecorded plat thereof."

[Endorsements]: E.—238. In the District Court of the United States, in and for the District of Arizona. Julia Mosher Collins, William B. Lount, Hattie L. Mosher, Plaintiffs, vs. City of Phoenix, a Municipal Corporation, Defendant. Statement of Evidence. Filed April 27, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [81]

In the District Court of the United States, in and for
the District of Arizona.

E.—90.

JULIA MOSHER COLLINS, WILLIAM B.
LOUNT, HATTIE L. MOSHER,
Appellants,

vs.

CITY OF PHOENIX, a Municipal Corporation,
Appellee.

**Notice of Filing and Presentation of Statement of
Evidence.**

To the Honorable R. E. SLOAN, and the Honorable
J. E. NELSON, Attorneys for Appellee:

PLEASE TAKE NOTICE that on the 27th day of April, 1920, the undersigned filed with the clerk of this court a statement of the evidence to be included in the record in the above cause, and that on the 10th day of May, 1920, he will present the same for approval to the Honorable William H. Sawtelle, Judge

of the District Court of the United States in and for the District of Arizona, at Tucson, Arizona.

Dated this 27 day of April, 1920.

(Signed) J. B. WOODWARD,
Attorney for Appellant.

Service of within notice and copy of statement of evidence is hereby accepted this 27th day of April, 1920.

(Signed) R. E. SLOAN,
R. O. W.,
J. E. NELSON,
Attorneys for Appellee.

[Endorsements]: E.—238. In the District Court of the United States in and for the District of Arizona. Julia Mosher Collins, William B. Lount, Hattie L. Mosher, Appellants, vs. City of Phoenix, a Municipal Corporation, Appellee. Notice. Filed April 27, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [82]

In the District Court of the United States, in and for the District of Arizona.

E.—90.

JULIA MOSHER COLLINS, WILLIAM B.
LOUNT, HATTIE L. MOSHER,
Appellants,

vs.

CITY OF PHOENIX, a Municipal Corporation,
Appellee.

Stipulation in re Statement of Evidence.

Defendant's counsel in the above cause agree that the statement of the evidence filed by plaintiffs and appellants herein is correct.

(Signed) JAMES E. NELSON,
Atty. for Appellee.
J. B. WOODWARD,
Attorney for Appellants.

[Endorsements]: E.—90. In the District Court of the United States, in and for the District of Arizona. Julia Mosher Collins, William B. Lount, Hattie L. Mosher, Appellants, vs. City of Phoenix, a Municipal Corporation, Appellee. Stipulation. Filed May 14, A. D. 1920. C. R. McFall, Clerk. James E. Nelson, Attorney for Appellee. J. B. Woodward, Attorney for Appellant. [83]

In the District Court of the United States, in and for
the District of Arizona.

JULIA MOSHER COLLINS, WM. B. LOUNT and
HATTIE L. MOSHER,

Appellants,

vs.

CITY OF PHOENIX, a Municipal Corporation,
Appellee.

Order Approving Statement of Evidence.

The foregoing statement of evidence and proceedings in the above-entitled cause having heretofore, on the 27th day of April, 1920, been lodged in the office

of the clerk of this Court by the appellants for examination by the defendant and appellee, and their solicitors having been duly notified by the plaintiffs or by the appellants thereof, and having stipulated and agreed with the appellee and defendant that the same is correct, and the appellee having further filed a written consent to the approval thereof, and the said statement, as above set forth, being found by the Judge of this court to be true, complete and properly prepared, the same is hereby approved and the same shall be filed in the office of the clerk of this court and become a part of the record in this case for the purposes of the appeal.

Dated May 15th, 1920.

(Signed) WM. H. SAWTELLE,
Judge.

[Endorsements]: Filed May 15, 1920. C. R. McFall, Clerk. United States District Court, for the District of Arizona. [84]

In the District Court of the United States for the
District of Arizona.

Honorable WILLIAM H. SAWTELLE, Presiding.

(Minute Entry of May 10th, 1920.)

IN EQUITY—E.-90 (Phoenix).

(Phoenix, Maricopa County, State of Arizona.)

JULIA MOSHER COLLINS, WILLIAM B.
LOUNT, HATTIE L. MOSHER,
Appellants,

vs.

CITY OF PHOENIX, a Municipal Corporation,
Appellee.

**Order Enlarging Time to File Record and Docket
Case.**

It appearing to the Court that the clerk of this court will be unable to prepare the record in this case and return and file the same with the clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco, Cal., on the 29th day of May, 1920, that being the return day of the citation heretofore issued;

Now, therefore, for good cause, it is hereby ordered that the time to file the record in this case and to docket this case with the clerk of the U. S. Circuit Court of Appeals for the Ninth Circuit, and the return day of said citation be and same is hereby enlarged and extended until and including the first day of August, 1920. [85]

In the District Court of the United States, in, and for
the District of Arizona.

E.-90.

JULIA MOSHER COLLINS, WILLIAM B.
LOUNT, HATTIE L. MOSHER,

Appellants,

vs.

CITY OF PHOENIX, a Municipal Corporation,
Appellee.

**Motion for Order Transmitting Plaintiffs' Original
Exhibit "C."**

Comes now J. B. Woodward, attorney for appellants, and moves the Court for an order, making a certain map—sketch map of the property in dispute in the City of Phoenix—introduced as evidence on the hearing of this case, a part of the record, and the original so introduced transmitted with the records to the court on appeal.

J. B. WOODWARD,
Attorney for Appellants.

[Endorsements]: Filed May 21, 1920. C. R. McFall, Clerk U. S. District Court. By Clyde C. Downing, Deputy. [86]

In the District Court of the United States, in and for
the District of Arizona.

E.-90.

JULIA MOSHER COLLINS, WILLIAM B.
LOUNT, HATTIE L. MOSHER,
Appellants,

vs.

CITY OF PHOENIX, a Municipal Corporation,
Appellee.

**Order Directing Transmission of Plaintiffs' Original
Exhibit "C."**

Upon application of appellant herein, it is ordered
that a certain map—sketch map of the property in
dispute in the City of Phoenix—be transmitted with
the records to the Circuit Court of Appeal of the
Ninth Judicial District.

WM. H. SAWTELLE,
Judge.

[Endorsements]: Filed July 19, 1920. C. R. Mc-
Fall, Clerk U. S. District Court. [87]

In the District Court of the United States, in and for
the District of Arizona.

IN EQUITY—E.-90 (Phoenix).

(Phoenix, Maricopa County, State of Arizona.)

JULIA MOSHER COLLINS, WILLIAM B.
LOUNT, HATTIE L. MOSHER,
Appellants,

vs.

CITY OF PHOENIX, a Municipal Corporation,
Appellee.

Affidavit of Service of Citation on Appeal.

State of Arizona,
County of Maricopa,—ss.

J. B. Woodward, being duly sworn, on oath states:

That he is of lawful age; and that in behalf of appellants herein he served a copy of hereto annexed citation on appeal upon appellee's attorneys, R. E. Sloan and J. E. Nelson, at their office, on the first day of May, A. D. 1920.

J. B. WOODWARD.

Subscribed and sworn to before me this first day
of May, 1920.

THUREN G. HOUGHTON,
Notary Public.

My commission expires April 30, 1921.

[Endorsement]: Filed May 1st, 1920. C. R.
McFall, Clerk. By Clyde C. Downing, Deputy
Clerk. [88]

Plaintiffs' Exhibit "A."

THIS INDENTURE, Made the Twenty-first day of September in the Year of our Lord, One Thousand Eight Hundred and Eighty-one, between B. L. Conyers and Isabell Conyers, his wife, of the City of Phoenix, Territory of Arizona, parties of the first part and Samuel D. Lount, of the same place, the party of the second part, WITNESSETH: That the said parties of the first part, for and in consideration of the sum of Thirteen Hundred Dollars, lawful money, of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, doth by these presents, grant, bargain, sell, convey and confirm unto the said party of the second part, and to his heirs, and assigns forever, all that certain lot piece or parcel of land, situate, lying and being in the County of Maricopa Territory of Arizona, and bounded and described as follows, to-wit: That portion of the West half of the South east quarter of Section number five in Township one North, of Range three East of the District of land subject to sale at the land office at Florence, Territory of Arizona, more particularly described as follows: Commencing at the intersection of Van Buren and Centre Street of *sd* City of Phoenix on the East Side of Centre Street and the North Side of Van Buren Street, and running thence East along the line of said Van Buren Street, Seven Hundred and Fifty four feet to a post, thence North Seven Hundred and fourteen (714) feet to a post, Thence West

Seven hundred and Sixty-one feet to a post, Thence South Seven Hundred and twelve feet to the place of beginning.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the rents, issues and profits thereof; and, also, all the estate, right, title, interest, claim of homestead, property, possession, claim and demand whatsoever, as well in law as in equity of the said parties of the first part, of, in or to the said premises, and every part or parcel thereof, with the appurtenances.

TO HAVE AND TO HOLD, All and singular, the said described premises, together with the appurtenances thereunto incident, unto the said party of the second part, his heirs and assigns, forever. And the said parties [89] of the first part and their heirs, the said premises, in quiet and peaceable possession of the said party of the second part, his heirs and assigns, against the said party of the first part and their heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same, shall and will WARRANT, and by these presents forever DEFEND.

IN WITNESS WHEREOF, the said parties of the first part, have hereunto set their hands and seals the day and year first above written.

B. L. CONYERS. (Seal)

ISABELLA CONYERS. (Seal)

Signed, sealed and delivered in the presence of:

Territory of Arizona,
County of Maricopa,—ss.

On this 21st day of September, A. D. 1881, before me, R. F. Kirkland, recorder in and for the County of Maricopa, Territory aforesaid, personally appeared B. L. Conyers, and Isabella Conyers, his wife, known to me to be the same persons whose names are subscribed to the foregoing instrument, and who, each of them, acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein mentioned. And the said Isabella Conyers described in said instrument as a married woman and the wife of the said B. L. Conyers, upon an examination without the hearing of her husband, I made her acquainted with the contents of the said instrument and thereupon she acknowledged to me that she executed the same freely and voluntarily for the uses and purposes therein mentioned, and that she did not wish to retract said execution.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

R. F. KIRKLAND,
County Recorder,
By E. B. Kirkland,
Deputy.

[End.]: Dated Sept. 21, 1881. Recorded at the request of M. W. Kales, Sept. 21, A. D. 1881, at 45 min. past 2 P. M. in Book 7 of Deeds, page 32

Records of Maricopa County, Arizona. R. F. Kirkland, County Recorder. By E. B. Kirkland, Deputy. Plaintiffs' Exhibit No. "A." Admitted and filed March 12, 1920. C. R. NeFall, Clerk. By Clyde C. Downing, Deputy. Case No. E.-90, Phoenix. [90]

OFFICIAL PLAT
 OF THE CITY OF PHOENIX
 CHURCHILLS DISTON
 IN THE CITY OF PHOENIX
 MARICOPA COUNTY
 ARIZONA TERRITORY.

Part of the East Quarter (SE 1/4) of Section Five (5) Township
 (the 11) North Range Three (3) East of the Gila and Salt River Base and Meridian

DEDICATION

The undersigned plat of Phoenix into streets, avenues and alleys, being all of the South-East quarter (SE 1/4) of Section Five (5), Township (the 11) North Range Three (3) East of the Gila and Salt River Base and Meridian, is hereby dedicated to the official and complete plat of the residents of Churchill's Addition to the City of Phoenix, Maricopa County, Arizona Territory, showing blocks and lots and giving a provision of same also the numbers of each block and lot, names and widths of all streets and avenues, the widths of all alleys, and the plat is a correct and true plat of said territory of said Churchill's Addition and the Streets and Avenues and alleys shown thereon are hereby dedicated to the public according to and in accordance with the City of Phoenix A.T.

In witness whereof the Corporation Council of the City of Phoenix A.T. has caused these presents to be signed by the Mayor of said City and in its behalf and attest to by the City Recorder of said City and the City of Phoenix A.T. to be attested hereon.

Done this 7th day of September A.D. 1898 The Corporation Council of the City of Phoenix by J. D. Adams Mayor.

Attest T. A. Luba City Recorder. (T. Seal)



(Endorsement: Plaintiffs Exhibit No. "B";
 Admitted and filed March 12, 1920
 C. R. McFall, Clerk, By Clyde C. Downing, Deputy)

Plaintiffs' Exhibit "D."

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,
Phoenix, Ariz.

November 21, 1919.

To Whom It May Concern :

I hereby certify that the records of this office show that Pre-emption Declaratory Statement 97 was filed January 10 (or 16) 71 and Apr. 21, 71 by Daniel Troomey for the SE. 1/4, section 5, Tp. 1 N., R. 3 East G. and S. R. Mer. Entry No. 45 was made Jan. 2, 74.

SCOTT WHITE,
Receiver.

[Endorsements]: Ptf's. Ex. "D." Admitted and Filed March 12, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy. [92]

In the District Court of the United States, in and for
the District of Arizona.

E.-90.

JULIA MOSHER COLLINS, WILLIAM B.
LOUNT, HATTIE L. MOSHER,
Appellants,

vs.

CITY OF PHOENIX, a Municipal Corporation,
Appellee.

Praeceptum for Transcript of Record.

The clerk of this court is hereby directed to pre-

pare and certify a transcript of the record in the above-entitled case for the use of the United States Circuit Court of Appeals for the Ninth Judicial Circuit by including therein the following:

Complaint of Julia Mosher Collins, William B. Lount and Hattie L. Mosher, filed November 3d, 1919.

Answer of City of Phoenix, filed November 22d, 1919.

Findings and judgment, filed March 12th, 1920.

Notice of Appeal, filed March 31st, 1920.

Petition for appeal, filed March 31st, 1920.

Order allowing appeal and fixing bond, filed April 12th, 1920.

Statement of evidence.

Amended assignment of errors, filed April 26, 1920.

Bond on appeal, filed April 27, 1920.

Appellants' Exhibits "A," "B," "C," "D."

Citation, filed April 30, 1920.

Praeipe for record, filed May 1, 1920.

Notice of filing statement, filed April 27, 1920.

(Signed) J. B. WOODWARD,
Attorney for Appellants.

[Endorsements]: E.-90. In the District Court of the United States, in and for the District of Arizona. Julia Mosher Collins, William B. Lount, Hattie L. Mosher, Appellants, vs. City of Phoenix, a Municipal Corporation, Appellee. Praeipe for Record. Filed May 1, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk.

Service of copy accepted this May 1, 1920.

RICHARD E. SLOAN,
Atty. for Appellee. [93]

In the District Court of the United States for the
District of Arizona.

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said United States District Court for the District of Arizona, including the records, papers and files in the case of Julia Mosher Collins, William B. Lount, and Hattie L. Mosher, Appellants, vs. City of Phoenix, Appellee, said case being No. E.-90 (Phoenix) on the docket of said court.

I further certify that the attached transcript contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein, together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the originals of record and on file in my office as such Clerk in the City of Phoenix, State and District aforesaid.

I further certify that the cost for preparing and certifying to said record, amounting to \$28.40, has been paid to me by Hattie L. Mosher (appellant) in the above-entitled cause.

And I further certify that the original citation issued in this cause is hereto attached.

WITNESS my hand and the seal of said United States District Court this 20th day of July, A. D. 1920.

[Seal] C. R. McFALL,
Clerk United States District Court, District of
Arizona. [94]

In the District Court of the United States, in and for
the District of Arizona.

IN EQUITY—E.-90 (Phoenix).

(Phoenix, Maricopa County, State of Arizona.)

JULIA MOSHER COLLINS, WILLIAM B.
LOUNT, HATTIE L. MOSHER,

Appellants,

vs.

CITY OF PHOENIX, a Municipal Corporation,
Appellee.

Citation on Appeal.

United States of America,—ss.

To City of Phoenix, and to R. E. Sloan and J. E.
Nelson, Its Attorneys, GREETING:

YOU ARE HEREBY CITED AND ADMON-
ISHED to be and appear before the United States
Circuit Court of Appeals for the Ninth Judicial Cir-
cuit of the United States, held at San Francisco,
Cal., on the 29th day of May, 1920, pursuant to an
order allowing an appeal filed and entered in the
clerk's office of the District Court of the United
States for the District of Arizona, from a final de-
cree signed, filed and entered on the 12th day of

March, 1920, in that certain suit, being In Equity—No. E.-90, wherein Julia Mosher Collins, William B. Lount and Hattie L. Mosher are plaintiffs and appellants, and you are the defendant and appellee, to show cause, if any there be, why the decree rendered against said appellants, as in said order allowing said appeal mentioned, should not be corrected, and why justice should not be done to the parties in that behalf.

Witness the Honorable WILLIAM H. SAWTELLE, United States District Judge for the District of Arizona, this 30th day [95] of April, 1920, and of the Independence of the United States 144th.

WM. H. SAWTELLE,
United States District Judge for the District of
Arizona.

Service accepted this 30th day of April, 1920.

Solicitor for Defendant.

[Endorsed]: E.-90 (Phx.) In the District Court of the United States in and for the District of Arizona. Julia Mosher Collins, William B. Lount, Hattie L. Mosher, Appellants, vs. City of Phoenix, a Municipal Corporation, Appellee. In Equity—(Phoenix). (Phoenix, Maricopa County, State of Arizona). Filed April 30, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk.

[Endorsed]: No. 3525. United States Circuit Court of Appeals for the Ninth Circuit. Julia Mosher Collins, William B. Lount and Hattie L. Mosher, Appellants, vs. City of Phoenix, a Municipal Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Arizona.

Filed July 23, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3525.

United States
Circuit Court of Appeals
For the Ninth Circuit

JULIA MOSHER COLLINS, WILLIAM B. LOUNT
AND HATTIE L. MOSHER,
Appellants,
vs.
CITY OF PHOENIX, A Municipal Corporation,
Appellee.

Appellant's Brief

J. B. WOODWARD, Phoenix, Arizona.
Attorney for Appellant.

Filed this.....day of.....1920.

.....Clerk.

By.....Deputy Clerk.

FILED

SEP 1 - 1920

U. S. DISTRICT COURT



IN THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.

JULIA MOSHER COLLINS, et al.,	}
Appellants,	
v.	
CITY OF PHOENIX,	
Appellee.	}

BRIEF OF APPELLANT.

Statement of the Case.

This appeal is brought by Julia Mosher Collins, et al., to reverse the judgment of the United States District Court for the District of Arizona, rendered against plaintiffs below, and appellants herein.

Appellants allege in their complaint that for upwards of forty-eight years they and their predecessors in interest have been, and now are, the owners in fee and in undisturbed possession of a tract of land now situate within the boundaries of the City of Phoenix, Arizona, and during the intervening years, and now, known as the Lount Tract, extending from the intersection point of section line on the North side of Van Buren Street between Sections 8

and 5, to the East side of Center Street, East to Second Street, a distance of 704 feet; thence North to Taylor Street; thence West to Center Street; thence South to the place of beginning;

That the strip of land in issue being 33 feet wide, extending from the East side of Center Street and running thence East 704 feet along the North side of the section line between Sections 8 and 5, Township 1 North, Range 3 East, Gila and Salt River Base and Meridian, in Maricopa County, Arizona, to a point; thence North 33 feet to a point; thence West 704 feet to a point; thence South 33 feet to the place of beginning, was and is now, an integral and component part of the said Lount Tract;

That no part of said tract has, by appellants, or by any authorized agent of theirs, ever been platted or in any manner conveyed or dedicated to the public use as a highway or street. (Tr. p. 5, V.)

That appellants, in their use, occupation and development of said tract, for mercantile and sale purposes, for themselves and for the convenience of their employees and tenants, have heretofore left thereon, as an open space, abutting on the North side of Van Buren Street, certain paths and driveways of the strip of land in controversy, for mer-

cantile and sale purposes, and for the convenience of their employees and tenants, and have connected same with other paths and driveways leading to other open spaces and driveways in said Lount Tract; that in the use of same appellants have never objected, and do not now, seek to restrain the public from traveling over the open spaces they had provided for their own use and purposes in the development of their property interest in said tract; the permissive right so given the public being limited to the right to travel over the same, (Tr. p. 5, 6, VI) ; that during the intervening years down to the 23rd day of July, 1919, said strip of land in issue was in the undisturbed possession of appellants and their predecessors in interest, and the City of Phoenix, until the last mentioned date, at no time claimed or asserted ownership of same.

Defendant pleads: that ever since the time the title to said strip of land was acquired from the government by the predecessors of interest of Plaintiffs, said strip has been recognized, used and occupied by the public, with the full knowledge, acquiescence and consent of the plaintiffs and their predecessors in interest, as a public road, highway or street. (Tr. p. 23) ;

That for more than twenty years prior to the institution of this suit, the said strip of land has been

used and occupied as a public highway and street of defendant, and defendant has been in open, notorious, peaceable, adverse and exclusive possession and control of said strip of land as a part of said street devoted and dedicated to public use. (Tr. 25-26.)

The case was tried before the court without a jury, which court rendered a judgment in favor of defendant and against the plaintiffs, deciding:

1. That defendant is in lawful possession of said strip of land as a part and parcel of Van Buren Street, and possesses full power and authority to improve the same and otherwise deal with the same as a public highway and street of said city;
2. That the plaintiffs, and neither of them, have any right, title and interest in and to the said land, or any part thereof;
3. That plaintiffs are not entitled to recover in this action;
4. That the defendant is entitled to judgment against said plaintiffs for its costs. (Tr. p. 35.)

The questions involved are:

1. Can the undisputed owners of a large tract of land be divested of their title and possessory rights, without dedication, to a described part of same, by reason of having for their own use, occupation and development of the whole tract, left the said designated part open for the convenience of their tenants, employees and servants and have never objected and are not now objecting to the public traveling over said described smaller tract?
2. Can the defendant, City of Phoenix, by ordinance, acquire title to the strip of land in issue without condemnation proceedings required by the eminent domain laws of Arizona?
3. Can appellants' permissive use to the public, limited, and exercised only to travel over the land, and not as a matter of right, ripen into a lawful possession of the appellee with full power and authority to improve the same and otherwise deal with the land as a public highway or street?

I. ASSIGNMENT OF ERROR No. 1.

The Court erred in ignoring the unimpeachable testimony of Hattie L. Mosher, Victor A. Redewill and Eugene Redewill, who substantially had grown from infancy to woman and manhood on or near the property, in that:

Hattie L. Mosher testified: Samuel D. Lount went into possession of said Lount Tract September 21, 1881, and it has ever since been in the possession of the family, and this strip of land in connection with the other land north was just farming, ranch land, and was so used consecutively until 1895, when the right of way to the street car people was given, (Tr. p. 45); that she had a rose garden there after 1895, and the last remains of that stood until 1901, and some of the roses remained there in 1909. This strip was enclosed in a barbed wire fence, as shown by Mr. C. J. Dyer's sketch map. (Tr. p. 46.) plaintiffs and predecessors have never dedicated to the city or public, use of this strip of land, or any part of it, and until now the City or public have never asserted any right in the strip—plaintiffs have never objected, and are not now objecting to the public traveling over same. "We left the open spaces to enhance the value of our property and for our own convenience and for the

convenience of our tenants and customers, and so that if in the future we ever wanted to sell any property to others outside of the family, we would have the tract so arranged we could give them right of way." "I paid taxes on that strip and consider I am so doing now. The Lount Tract was always assessed in its entirety. In the last ten years it has been designated by blocks." (Tr. p. 47, 48.)

VICTOR A. REDEWILL testified: The strip north of the wire fence was cultivated down to 1902 or 1903. * * This was generally called Van Buren Street * * * The street wasn't used very much. They used Second Street and when they did go, they went on the south side of the street which would be south of the section line (Tr. p. 53.)

EUGENE REDEWILL testified: Mrs. Mosher's father's property was in a great big square by itself. Streets were not cut through. It was possible to get through from Center Street on Van Buren Street, but it wasn't a road that was used at all. * * I don't believe there was any street through there that was recognized as any kind of a street at all until after 1900, probably a year or two before 1905; and

A. S. MILLS testified there was travel over the road in 1905 and 1906; the wagon road was crowd-

ed to the south side. * * It wasn't a real street, a passable street, and all travel was by the streets to the south. * * * I do not know whether it was regarded as a street. * * * It wasn't used as a street. * * * It isn't to-day much of thoroughfare. (Tr. p. 50, 51, 77.)

For the reason:

A. The said testimony was direct, material and competent in support of the complaint, that plaintiffs were owners in fee in possession, that it was an intregal and component part of the Lount Tract and there had never been any dedication other than a permissive right to travel over the strip in issue, that this permissive right the public, nor the defendant, had exercised for twenty years, as found by the court:

B. That admission of defendant's exhibits as evidence from 4 to 19 inclusive, (Tr. p. 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93.) was admitted over objections of plaintiffs (Tr. p. 64), in that: said testimony was immaterial, irrelevant and incompetent, and did not tend to prove any issue in the case, as all of the transactions sought to be given in evidence were during a less period than twenty years, and in no manner supports the Court's finding of facts;

C. The admission of the records of the Board of Supervisors of Maricopa County of March 18, 1871, and May 15, 1871, (Tr. p. 64), is incompetent as evidence for the reason that the land had been prior to this time segregated from the public domain by the presumptive declaratory statement of David Twomey in the month of January, 1871, (Tr. p. 107.)

D. Defendant's exhibit No. 1, (Tr. p. 78, 79), bears no date, and no inference arise, it was executed more than twenty years since.

E. The admitting in evidence by the Court of ordinance No. 275 (Tr. p. 56, 57, 58), ordinance No. 193, (Tr. p. 60, 61, 62,) was immaterial, irrelevant and incompetent, not tending to prove any issue in the case, but tending to prejudice the rights of appellants by the unfair assumption that by force of these ordinances the City of Phoenix acquired any or all the rights and title to plaintiff's property enumerated in the Court's findings of fact. (Tr. p. 33, 34, 35.)

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II. ASSIGNMENTS OF ERROR Nos. 2, 3, 4, 5.

The Court erred in said conclusions of law Nos. 1, 2, 3, 4, 5, (Tr. p. 39), in that:

Said conclusions of law are not based upon any competent, relevant and material evidence, and are in conflict with direct and positive evidence, uncontroverted, submitted by plaintiffs, that there had been no dedication of the strip of land in issue; that the only right of travel over same had been permissive—a mere license—that their ownership was and had been, since 1881, a fee; that the use of defendant had not been adverse; that no prescriptive right by use of twenty years had been acquired.

ARGUMENT.

The record of this case bears out in every particular the contention of appellants that there has never been any intention to dedicate the strip of land in dispute; and the contention of appellees

that certain acts and circumstances constitute a dedication is in conflict with the best and ruling authorities in this country. The appellants admit that they permitted the public to travel over the land, but simply by an easement, which did not give the appellee the right to disturb the soil, a right to tear up the street, or a right to exclusive possession to improve or alter existing conditions, as held in *City and County of San Francisco v. Grote*, 52 Pac. at page 120:

“It is not a trival thing to take another’s land.

The court will not lightly declare a dedication to public use. It is elementary law that an intention to dedicate upon the part of the owner must be plainly manifest.”

The case of *Darling v. Mayor, etc., of Jersey City*, 67 Atl. 709, at page 710, in many features is, as regards dedication, similar to the one at bar. There, as here, the City claimed that by reference contained in twelve deeds to the Fowler Official Map, there was a tender of dedication; there, as here, the only acceptance alleged is the use of the street by the public and the adoption of said map in assessments. Held: “That title in complainant, once fixed by conveyance to him, must be presumed

to continue in him until the contrary shall be shown affirmatively." (p. 910, 711.)

The Town of West Point v. Bland, 56 S. E. 802, (Va.) held:

"In order to constitute a dedication, there must be an intention to appropriate the land for the use and benefit of the public; the acts and declarations of the land owner indicating such intention must be unmistakable in their purpose and decisive in character to have that effect (p. 804) * * * the ownership of land, once had, is not to be presumed to have been parted with; acts and declarations relied on to show a dedication should be unequivocal and decisive, manifesting a positive and unmistakable intention on the part of the owner to permanently abandon his property to the specific public use"; holding further, "where the mere use by the public of the supposed street, although long continued, should be regarded as a mere license, revocable at the pleasure of the owner."

Cincinnati & M. V. R. Co. v. Village of Roseville, 81 N. E. 178, (Ohio), held:

"To show the establishment of a street by a common law dedication, it is essential to prove clearly that the owner of the land intended to donate it for that use; and to prove also an acceptance." (p. 179.)

There, the street had been used for forty years by the public, held; simply as a permissive right.

The case of *Hartley v. Vermillion*, decided by Judge Garoutte in 70 Pac. at page 273, is analogous in the issues raised and discussed, similar to the one at bar on the question of effect of evidence of travel by the public. Held: "The finding that the strip of land in question was traveled and used by the public ever since 1872 with the knowledge of the plaintiff and without objection on his part, is only a finding of probative facts tending to prove a dedication; but the fact of dedication—which, by the way, is neither alleged nor found—does not necessarily follow from these probative facts, since they are not necessarily inconsistent with a total absence of intention to dedicate and may indicate merely a license. The finding that the strip of land is public highway, whether deemed an ultimate fact or a conclusion of law, is not justified. The evidence on the part of the defendant was sufficient to justify the finding as to the user by the public with the knowledge of the plaintiff and without objection from him, but nothin more in favor of the defendant. As this finding is obviously insufficient to support the judgment, I think the order and judgment appealed from should be reversed. * * * Dedication is a pure question of

fact. The intention of the owner to dedicate is a vital element in every case, and that intention is also a pure question of fact. A mere permissive user by the owner, of land, for a highway, never can amount to a dedication; that is a user by license and nothing more, and of itself never would ripen into a dedication, no matter how long continued. * * Long continued adverse user by the public could be adverse if the owner consented to prescription, but it cannot amount to a dedication. It is not plain that the user of a highway by the public could be adverse if the owner consented to the user, and dedication always involves the assent of the owner of the land. If he objects to the use, if the use is against his assent, that fact disproves any intention on his part to dedicate. It is said in the *City of Los Angeles v. Kysor*, 125 Cal. 465, 58 Pac. 91: "In all those cases where it is claimed that dedication is created in pais, it may be said that there is no amount of evidence which will justify the Court in instructing the jury that dedication is conclusively shown. The owner's intention is the all important element in creating a dedication, and that intention is a question of fact. It never can be a matter of law.' * * It is perfectly evident that the appropriation of land by the public is not a dedication, and, to justify a finding of fact by a

trial court that the owner has dedicated his land to public use as a highway, the evidence must be plain and convincing that such was his intention. * * *

Some claim is made that the public have obtained rights to the road by prescription. There is nothing in this claim. Time of user is not a material element in creating a dedication of a highway; but, for the public to acquire an easement in land by prescription for a highway, it is a most material element. Yet continued user by the public for the statutory period of limitations is not sufficient to vest rights. As in all other cases of title acquired by prescription, the user must be adverse. A permissive user will never ripen into a right by prescription. In this case there was no adverse user and no claim of right that this court can discover from the evidence. Certainly, defendants never thought the public was claiming a right in this land adverse to them. They saw nothing to put them upon inquiry as to that kind of a claim. The claim of right, as in all other cases of adverse possession, must be open and notorious, and here there was nothing of this kind."

The testimony of H. R. Patrick (Tr. p. 65, 66, 67, 68,) for appellee certainly is of little force. The statement that he surveyed for Conyors in 1880 is not followed by any testimony that the survey so

made was known to Samuel D. Lount or recognized by him, and it does not appear that the survey was of record. He states that he set off 33 feet on the north side for the County Road, and laid off 33 feet on the south side of the section line of the property in dispute. He saw no fences there at that time and he did not know of fences that Lount may have afterward placed on the property.

The testimony of GEORGE KIRKLAND, (Tr. p. 70, 71,) to the effect that taxes were paid on the Lount Tract by appellant until 1910, after that, he says: "They did pay more taxes because it was not assessed in acre tracts. The city made the change and subdivided the blocks for their own convenience."

The testimony of A. S. MILLS, (Tr. p. 77), referring to fences: "There was a fence about the middle of what is now the present Van Buren Street or about 25 feet from Mr. Porterie's fence.

All this testimony is in line with the testimony of plaintiff's that their purchase and holding were to the north line of the section line between sections 8 and 5.

That appellees contentions are so far afield of common law rights, and are so insistent of the trend, to measure all rights by the ever green and

growing pastures of the statute law and construction, are not to be commended.

In conclusion, we earnestly insist that by reason of the numerous errors pointed out, the judgment of this Court should be reversed, with directions to enter judgment for appellants.

Dated: Phoenix, Arizona, this 2nd day of September, 1920.

J. B. WOODWARD,
Phoenix, Arizona.
Attorney for Appellants.

7

IN THE
UNITED STATES
CIRCUIT COURT
OF APPEALS
FOR THE
NINTH CIRCUIT

JULIA MOSHER COLLINS,
WILLIAM B. LOUNT and
HATTIE L. MOSHER,
Appellants,

vs.

CITY OF PHOENIX, a mu-
nicipal corporation,
Appellee.

No. 3525

SCHEDULE OF
DEFENDANT'S EXHIBITS AND TESTI-
MONY ARRANGED BY
REFERENCE TO SUBJECTS

RICHARD E. SLOAN and
JAMES P. NELSON,
Attorneys for Appellee.

Filed this.....day of....., 1920.

Clerk of the Supreme Court of the State of Arizona.

IN THE UNITED STATES
CIRCUIT COURT OF
APPEALS FOR THE
NINTH CIRCUIT

JULIA MOSHER COLLINS,
WILLIAM B. LOUNT and
HATTIE L. MOSHER,

Appellants,

vs.

CITY OF PHOENIX, a mu-
nicipal corporation,

Appellee.

No. 3525

SCHEDULE OF
DEFENDANT'S EXHIBITS AND TESTI-
MONY ARRANGED BY
REFERENCE TO SUBJECTS

LAND IN DISPUTE.

The land in dispute is a strip 33 feet in width and 704 feet in length constituting a part of Van Buren Street in the City of Phoenix. Van Buren Street runs east and west and is 66 feet in width. The center of the street follows the section line between Sections 8 and 5, Township 1 North, Range 3

East, 33 feet being on the north and 33 feet on the south of the section line.

Transcript Page 4

The strip in question is claimed by plaintiffs to be their private property and a part and parcel of what is known as the Lount Tract. This tract is included within what is known as Churchill's Addition to the City of Phoenix.

Transcript Page 5

LAND IN DISPUTE ORIGINALLY PART COUNTY HIGHWAY.

On March 18th, 1871, section lines within County of Maricopa declared highways by order of Board of Supervisors. The order specifically declared section line between Sections 8 and 5, including land in dispute, county road.

Transcript Page 64

Van Buren Street for full width actually used by public as highway as early as 1887.

Testimony of H. R. Patrick, Surveyor,

Transcript Pages 65 to 67

MAPS AND PLATS.

Lount Tract platted in 1888 as part of Churchill Addition to the City of Phoenix, showing Van Buren Street for full width.

Defendant's Exhibit A,

Transcript Page 27

In 1898 City of Phoenix filed with County Recorder of Maricopa County official plat Churchill Addition showing Lount Tract divided into blocks and Van Buren Street for full width.

*Defendant's Exhibit C,
Transcript Page 31*

ORDINANCES SHOWING DEDICATION.

Ordinance passed September 7th, 1898 by Common Council City of Phoenix, adopting defendant's Exhibit C as the official plat of Churchill's Addition, including Lount Tract; also declaring dedicated to public use all streets shown upon said plat and forbidding any encroachment thereon.

*Defendant's Exhibit 2
Transcript Page 56*

Ordinance passed March 4th, 1895, fixing the grade of Van Buren Street.

Transcript Page 60

Ordinance passed March 22d, 1909, giving block numbers to the Lount Tract in Churchill's Addition.

Transcript Page 61

DEEDS AND OTHER INSTRUMENTS SHOWING DEDICATION OF LAND AS PART OF VAN BUREN STREET.

Deed dated September 21st, 1881, describ-

ing Lount Tract as on north side of Van Buren Street.

*Plaintiff's Exhibit A,
Transcript Page 78*

Various deeds and other instruments signed by plaintiffs in which Van Buren Street is described as constituting the south line of the Lount property, and describing the lots and blocks of Lount Tract by reference to official plat of Churchill's Addition adopted in 1898.

*Defendant's Exhibits 4 to 18, inclusive,
Transcript Pages 80 to 92, inclusive*

Exhibit 8 supra describes the north line of Van Buren Street as being 33 feet north of the section line between Sections 5 and 8.

*Transcript Page 85
See also testimony Otto Kitchen, Surveyor,
Transcript Page 73*

Decree of distribution in the matter of the estate of Julia A. Lount, deceased, distributing Lount Tract to Hattie L. Mosher and William B. Lount, November 9th, 1908, property described as Block 1 and Block 2 of Churchill's Addition City of Phoenix.

*Defendant's Exhibit 7
Transcript Page 82*

DEDICATION AS SHOWN BY ADMIS- SION OF PARTIES.

Testimony of Homer A. Turney, Surveyor, showing admission by William B. Lount, one of the plaintiffs, of dedication of Van Buren Street as shown on map of Churchill's Addition.

Transcript Pages 68 to 70

Petition and protest to City of Phoenix asking that paving of Van Buren Street be deferred until a certain canal could be paved where it crosses and runs into Van Buren Street.

Transcript Page 78

DEDICATION SHOWN BY USER AND BY TAX ASSESSMENTS.

Testimony of V. A. Thompson, City Manager, that Van Buren Street has been improved and used as a street for full width by the City without protest from anyone as long as he has known the same, which covers a period of seventeen years.

Transcript Page 72

Testimony of George Kirkland showing assessment of Lount property by lots and blocks according to official survey of Churchill's Addition, and that no assessments have been made upon any part of Van Buren Street claimed by plaintiffs.

Transcript Pages 70 and 71

ARIZONA STATUTES RELATING TO
OFFICIAL PLATS OF ADDITIONS TO
TOWNS AND CITIES AND THE EF-
FECT OF SUCH MAPS UPON DEDICA-
TION OF STREETS.

“1891. Whenever any town, organized hereunder, or an addition to any such town, shall be laid out, the proprietors of the town or addition laid out, shall cause to be made an accurate plat or map thereof, setting forth:

First. All streets, alleys, avenues and highways and the width thereof.

Second. All parks, squares and all other grounds reserved for other uses, with the boundaries and dimensions thereof.

Third. All lots and blocks, with their boundaries, designating such lots and blocks by numbers, and giving the dimensions of such lots.

“1892. Such maps shall be acknowledged by the proprietor or some person for him, duly authorized thereunto by deed, before some officer authorized to take acknowledgement of deeds, and a copy thereof, so acknowledged, shall be filed in the office of the county recorder and also in the office of the clerk of such town or city.

“1893. The county recorder of the county shall record all such plats in a book to be kept by him for that purpose, and, when necessary, may reduce the scale of any such plat, and upon each record in the said book, shall endorse his certificate that the same is truly recorded from the original plat filed in his office. Every such original plat shall be preserved by the county recorder of the county, and the clerk of the city or town, among the records of their offices respectively.

“1894. All such original plats, or the records thereof, or copies therefrom, certified by the recorder having custody thereof, shall be evidence in all courts and places.

1895. Upon the filing of any such map or plat, the fee of all streets, alleys, avenues, highways, parks and other parcels of ground reserved therein to the use of the public, shall vest in such town, if incorporated, in trust, for the uses therein named and expressed; or if such town be not incorporated, then in the county until such town shall become incorporated, for the like uses.

“1896. All additions to any town, organized hereunder, shall be surveyed and platted, and a map thereof be submitted to the common council; and such map shall not be filed and recorded, as pro-

vided in this chapter, until the same shall have been approved by said common council."

Revised Statutes of Arizona 1913, Title 7, Chapter II, Paragraphs 1891 to 1896, inclusive.

Act of April 12, 1893.

United States
Circuit Court of Appeals
For the Ninth Circuit.

A. SLATER and BANK OF ALASKA, a Corporation,

Appellants,

vs.

E. LATHROP and ALICE JOHNSON,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court
for the Territory of Alaska, Third Division.

FILED
FEB 16 1921
F. D. MONCKTON,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

H. A. SLATER and BANK OF ALASKA, a Corporation,

Appellants,

vs.

A. E. LATHROP and ALICE JOHNSON,

Appellees.

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Upon Appeal from the United States District Court
for the Territory of Alaska, Third Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court for the Territory of Alaska,
Third Division.

No. C—173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,

Defendants.

Names and Addresses of Attorneys of Record.

Mr. EDWARD F. MEDLEY, of Cordova, Alaska,
Mr. B. O. GRAHAM, of Cordova, Alaska,

Attorneys for the Defendants and Plain-
tiffs in Error.

Messrs. DONOHUE & DIMOND, of Valdez,
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Attorneys for the Plaintiff and Defend-
ants in Error. [1*]

In the District Court for the Territory of Alaska,
Third Division.

No. C—173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,

Defendants.

*Page-number appearing at foot of page of original certified Transcript
of Record.

Amended Complaint.

Come now the above-named plaintiffs and after leave of the Court first had and obtained, file this their amended complaint, and for cause of complaint against the above-named defendants, allege as follows:

1.

That each of said plaintiffs are citizens of the United States and residents and inhabitants of the town of Cordova, Territory of Alaska, and each owns real property in said town of Cordova. That each of said plaintiffs is particularly damaged in a manner special and different from the damage to the general public of the town of Cordova by the acts committed by the above-named defendants and hereinafter set forth. That plaintiffs bring this action to protect their own rights and for and on behalf of the general public of the said town of Cordova.

2.

That the Bank of Alaska is a corporation duly organized and existing under and by virtue of the laws of the Territory of Alaska.

3.

That plaintiff A. E. Lathrop is the owner of Lots Nos. 23, 24, and 25, in block 2 of the town of Cordova, which property abuts on the westerly side line of First Street in the town of Cordova, the same being the principal business street of said town, and at great cost has erected on said property a large building. That in said building this

plaintiff nightly operates a motion-picture theatre, and also rents a number of stores for the conduct of mercantile businesses, and on the two upper floors of said building rents numerous offices and apartments. That the town of Cordova maintains a cross-walk across First Street from the westerly terminus of Burkhart Alley, hereinafter described, to the entrance of this plaintiff's theatre, and to the entrance of his building by which the upper floors of [2] said building are reached, and to the mercantile stores on the ground floor of said building. That a large number of the patrons of this plaintiff's theatre and customers of his tenants conducting mercantile stores in said building, and a large number of his tenants in the upper floors of said building, reach the same by way of and through Burkhart Alley and over said cross-walk. That if the the defendants are permitted to obstruct the said Burkhart Alley and close the same to the travel of the general public and to this plaintiff, said cross-walk will be removed by the municipal authorities of the town of Cordova, and this plaintiff will lose a large portion of his patronage to his motion-picture theatre, and his tenants conducting mercantile businesses on the ground floor of said building will lose a number of their customers, and the upper two floors of said building will be rendered less accessible for the tenants of his offices and apartments, thereby reducing the rental values of said building and this plaintiff's income therefrom, and will greatly depreciate the value of this plaintiff's said build-

ing, and this plaintiff will thereby suffer great and irreparable injury and loss.

4.

That plaintiff Alice Johnson is the owner of Lot 25 in Block 7 of said town of Cordova, which said lot lies along the southerly side of Burkhart Alley, hereinafter described. That the easterly end of said lot abuts on the westerly side line of Second Street of the said town of Cordova. Said lot extends from Second Street in a westerly direction to the regular alley running north and south through the center of Block 7. That this plaintiff has upon said lot a three-story building used by her as an apartment house. That the only entrance to her said apartments is off Burkhart Alley. That at the time this plaintiff purchased said lot, to wit, on the 8th day of July, 1918, said Burkhart Alley was and for a great many years theretofore had been an open public way and was being and had been continually used by the public as such, and this fact was one of the considerations that induced plaintiff to purchase said lot and premises. That if the defendants are permitted to obstruct the said Burkhart Alley and close the same to the travel of the general public and to the use of this plaintiff as hereinafter described, this plaintiff will suffer great and irreparable injury and loss, in that the tenants of said building occupying the various apartments will be thereby prevented from having free egress and ingress [3] to and from said building and the business portions of said town of Cordova, and the rental

value of the apartments in said building will be thereby greatly reduced, if not entirely destroyed, and the value of said premises will be reduced at least 50%.

5.

That on or about the month of May, 1908, the tract of land now covered by the said town of Cordova was surveyed for townsite purposes and laid off in lots and blocks, streets and alleys, and a map and plat thereof was on the twenty-second day of May, 1908, recorded in Book One at page ten of Maps and Plats, in the Cordova Recording Precinct, Territory of Alaska, which said map and Plat shows the said Block Seven to contain lots numbered from One to Sixteen, inclusive, abutting on the easterly side of First Street, and lots numbered from Seventeen to Thirty-two, inclusive, abutting on the westerly side of Second Street. There is and was an alley twenty feet wide extending northerly and southerly thru the center of the said block. That during the years 1908 and 1909 the original owners of the townsite of Cordova sold to the general public practically all of the lots in said townsite of Cordova as shown by said map and plat and a great number of buildings have been erected on said lots, and at the time of the acts committed by the defendants herein-after set forth in said town of Cordova had a population of between two and three thousand people.

6.

That in the summer of the year 1908 Lot No.

Seven (7) in Block No. Seven (7) of the said town of Cordova, was owned by Robert Ashland; Lot No. 8 (8) in Block No. 7 (7) was owned by A. E. Burkhart; Lot No. Twenty-five (25) in Block No. Seven (7) was owned by A. E. Burkhart; Lot No. Twenty-six (26) in Block No. Seven (7) was owned by M. Finkelstein. That at said time the owners of said lots were about to erect buildings on their respective lots and they then and there agreed to open an alley eight feet wide from First Street to Second Street in said town of Cordova, the center of said alley running along the dividing line between Lots Nos. Seven and Eight and Lots Nos. Twenty-five and Twenty-six in Block Seven of the said town of Cordova. That the then owners of Lot Seven and Lot Twenty-six in Block Seven gave four feet of their said lots along the southerly side thereof for said alley and the then owners of Lots Eight and Twenty-five of said Block Seven gave four feet [4] along the northerly side of their said lots for said alley. That said alley thereupon became known and ever since has been known and called Burkhart Alley. That shortly after said agreement the owners of the said four lots, heretofore described, erected buildings on their said respective lots, the side-walls of said buildings being four feet from the side line of said lots, thus leaving a public way eight feet wide from First Street and Second Street; that when the said owners of said lots erected buildings on their respective lots, they made various and many entrances into said buildings from Burkhart Alley

and in all manner treated said Burkhart Alley as a public highway. At the time said alley was opened up, it was agreed between the owners of said four lots that of the four-foot strip given by A. E. Burkhart for said alley along the northerly side of Lot 25 about 18 inches thereof should be used for the walk following the grade of the alley, and the remaining $21\frac{1}{2}$ feet should be used for higher walks, not following the grade of the alley, but on the levels of the floors of the buildings erected on said Lot 25, so that the occupants in the apartments of said buildings might conveniently reach the same from said alley. That said Burkhart Alley as it was originally opened up and has ever since been used and maintained, is more fully shown and described upon the plat attached to this complaint, marked Plaintiff's Exhibit "A" and made a part of this complaint.

7.

That as soon as said alley was opened as aforesaid, to wit, about the month of October, 1908, the same was used by the general public as a public highway and ever since has continuously and without interruption, hindrance or permission of anyone been used as a public street, alley or highway by the general public and by these plaintiffs until the acts of the defendants, hereinafter set forth, prevented them from so using a portion of it as a public highway.

8.

That on the fourteenth day of July, 1909, the municipality of the town of Cordova was duly in-

incorporated and organized and the first meeting of the duly elected common council was held on said day; that from said day until the present time the said common council of the municipality of Cordova has exercised rights of ownership and authority, and control over the said Burkhart Alley without hindrance, objection, or permission of anyone whomsoever; that said common council has provided for the lighting of said [5] alley during all of said time, has supervised and required the same to be kept in good repair, has caused fire hydrants to be placed opposite the intersection of said alley with First and Second Streets, the same as has been done at the intersection of all other public streets in the said town of Cordova; has erected and maintained a good and substantial cross-walk from the westerly side of First Street to the westerly terminus of the said Burkhart Alley; has maintained a cross-walk for Burkhart Alley where the same crosses the regular alley running north and south through the center of Block Seven, and by numerous and various other acts has exercised dominion and control over said Burkhart Alley from the time of the organization of said municipality until the present time.

9.

That at no time since said Burkhart Alley was opened as a public thoroughfare, as hereinbefore described, have the owners of any of the four lots abutting on said alley ever claimed or contended that said alley was not a public highway, excepting the defendants herein, and the first assertion of

rights in said alley was made by defendant H. A. Slater on the eight day of August, 1919; and the first assertion of any right in said alley by the defendant, the Bank of Alaska, was on or about the 10th day of September, 1919; that at the time of the opening of said alley as aforesaid, and many times since, A. E. Burkhardt, then the owner of Lots Nos. Eight and Twenty-five, which lie along the southerly side of the said alley, has stated to the general public and to various and numerous persons, residents, and property owners of the said town of Cordova, that Burkhardt Alley was a public thorofare and could not be closed by anyone.

10.

That the defendant H. A. Slater became the owner of Lot 7 in Block 7 of said town of Cordova in the latter part of the year 1917. That the defendant, The Bank of Alaska, became the owner of Lot 8 in Block 7 of said town of Cordova in the year 1918. That at the time each of said defendants purchased their respective lots the said Burkhardt Alley was a public highway and had been continuously used by the general public since the year 1908 as a public highway, and said defendants and each of them purchased their respective lots with full knowledge that said Burkhardt Alley was then being used as a public highway, and purchased said lots subject to the easement created by said Burkhardt Alley upon and over the southerly four feet of said Lot 7 and over and upon the northerly four feet of said Lot 8 in Block 7 of said town of Cordova. [6]

11.

That on the 8th day of August, 1919, the defendant, H. A. Slater, then being the owner of Lot No. 7 in Block No. 7 of the town of Cordova, did unlawfully and without right or authority obstruct the free use and enjoyment of Burkhart Alley as a public thoroughfare, and prevented a portion of said alley from being used as a public thoroughfare, and prevented these plaintiffs from the free use and enjoyment of said Burkhart Alley, and prevented the general traveling public and citizens, residents and inhabitants of the town of Cordova from the free use and enjoyment of a portion of said Burkhart Alley as a public highway by fencing off and enclosing four feet of the northerly side of Burkhart Alley extending from First Street to the rear of Lot 7 in Block 7, a distance of 100 feet. That said defendant H. A. Slater from the 8th day of August, 1919, and until on or about the 10th day of September, 1919, did maintain the said fence and enclosure and prevented the use of that portion heretofore described of Burkhart Alley from being used as a public highway. That on or about the 10th day of September, 1919, and after this suit had been commenced the defendant H. A. Slater removed said fence from that portion of said Burkhart Alley, and the defendant the Bank of Alaska immediately erected said fence enclosing the southerly four feet of said Burkhart Alley commencing at First Street and extending a distance of 100 feet to the rear of Lot 8 in said Block 7 of the town of Cordova. That each of said defend-

ants unlawfully claim that the land occupied by said Burkhart Alley, as the same passes over and upon lots 7 and 8 in said Block 7, is their private property, and each of said defendants threaten to and intend to permanently obstruct and close said Burkhart Alley from First Street to the rear of Lots 7 and 8, a distance of 100 feet, and threaten to and intend to prevent these plaintiffs and the general public of the town of Cordova from occupying, using or enjoying said Burkhart Alley as a public thoroughfare, and unless each of said defendants are enjoined by this Court, said defendants and each of them will obstruct and close said Burkhart and will prevent these plaintiffs and the general public of said town of Cordova from the free use and enjoyment of said Burkhart Alley.

[7]

12.

That if these defendants are, or either of them is, permitted to so obstruct and close said Burkhart Alley and to so prevent these plaintiffs and the general public of the town of Cordova from the free use and enjoyment of said portions of Burkhart Alley hereinbefore described, these plaintiffs will suffer great and irreparable injury and loss in their property rights, and the said traveling public of said town of Cordova will suffer great inconvenience and loss and damage.

13.

That more than 10 years have elapsed since said Burkhart Alley was laid out and first used as a public street. During all of said time said Burk-

hart Alley has continuously and without interruption been used by the inhabitants and residents and general public of the town of Cordova as a public street or alley without permission or objections or hindrance by anyone whomsoever.

14.

That plaintiffs have no plain, speedy, or adequate remedy at law.

WHEREFORE, plaintiffs pray this Honorable Court to decree as follows:

FIRST. That said defendants and each of them be restrained and enjoined, pending the final determination of this suit, from in any manner obstructing or fencing in any portion of the said Burkhart Alley, and that they and each of them be required, pending the final determination of this suit, to remove any and all obstructions placed by them or either of them in or upon said Burkhart Alley. And that they and each of them be required to restore to the public the free use of said alley as a public thoroughfare.

SECOND. That upon the final determination of this action, the said defendants and each of them be perpetually enjoined from in any manner obstructing the free use of said Burkhart Alley as a public street or alley for its entire width and for its entire length as laid out and used by the general public from the time it was first opened up in the year 1908. [8]

THIRD. That plaintiffs have judgment against the defendants and each of them for their costs and disbursements incurred in this action.

FOURTH. That plaintiffs have such other and further relief as to the Honorable Court may seem just and equitable in the premises.

DONOHUE & DIMOND,
Attorneys for Plaintiffs.

United States of America,
Territory of Alaska,—ss.

A. E. Lathrop and Alice Johnson, being first duly sworn, depose and say: That they are the plaintiffs named in the foregoing amended complaint and that they have read said amended complaint and know the contents thereof, and the same is true as they verily believe.

A. E. LATHROP.
ALICE JOHNSON.

Subscribed and sworn to before me this 28th day of September, 1919.

[Notarial Seal] ANTHONY J. DIMOND.
Notary Public for Alaska.

My Commission expires February 13, 1921.

Service of the foregoing amended complaint is hereby accepted this 29th day of September, 1919.

EDWARD F. MEDLEY,
B. O. GRAHAM,
Attorneys for the Defendants.

Filed in the District Court, Territory of Alaska,
Third Division. Sep. 29, 1919. Arthur Lang,
Clerk. By C. H. Wilcox, Deputy. [9]

In the District Court for the Territory of Alaska,
Third Division.

No. C—173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA,
Defendants.

Answer.

Come now the above-named defendants and for their answer to plaintiffs' amended complaint, admit, deny and allege as follows:

1.

Admit that the plaintiffs are citizens of the United States and residents and inhabitants of the town of Cordova, Territory of Alaska, and that they own real property in said town of Cordova. The defendants deny each and every other allegation, matter and thing contained in paragraph numbered one of plaintiffs' amended complaint.

2.

Admit paragraph numbered two of plaintiffs' amended complaint.

3.

Defendants deny that plaintiff A. E. Lathrop is the owner of lot twenty-three or of lot twenty-five in block number two of the town of Cordova. Defendant admits and alleges that plaintiff A. E. Lathrop operates a moving-picture theatre seven

nights each week in the building located on lots twenty-three, twenty-four and twenty-five in block number two of the town of Cordova, Alaska. Defendants deny that a large number of patrons of plaintiff's theatre, or customers of his tenants conducting mercantile stores in said building, or that a large number of his tenants in the upper floors of said building reach said building by way of or through said so called Burkhart Alley, but allege the fact to be that said Burkhart Alley is not now and has never been used to any material extent by any of the persons referred to in paragraph numbered three of plaintiffs' amended complaint or by the public generally or except by persons having occasion to use the side entrances of defendants' buildings, denies that the [10] cross-walk traversing First Avenue opposite the so-called Burkhart Alley will be removed by the municipal authorities of the town of Cordova or by anyone else if said so-called Burkhart Alley be closed, and deny that plaintiff A. E. Lathrop will lose a large portion or any portion of his patronage to his said motion-picture theatre, deny that his tenants conducting business on the ground floor of said building will lose a number of their customers or any of their customers, deny that the two upper floors of said building will be rendered less accessible for the tenants of his offices or apartments, deny that the rental values of said building or that plaintiff's income therefrom will be reduced, deny that the value of plaintiff's said building will be greatly depreciated or depreciated at all, and deny that

plaintiff will suffer great or irreparable injury or loss or any injury or loss by the closing of that portion of said so-called Burkhart Alley between lots seven and eight of said block seven.

4.

Answering paragraph numbered four of plaintiff's amended complaint, defendants deny that plaintiff Alice Johnson is the owner of lot twenty-five in block seven of said town of Cordova; and deny that the only entrance to said apartments is from said so-called Burkhart Alley, and allege that said building in which said apartments are located fronts on said Second Street of said town of Cordova and abuts upon the alley running north and south through said block seven, and that entrances from said Second Street and said north and south alley to said building now exist and have existed for a long time past; defendants deny that at the time plaintiff Alice Johnson purchased said lot twenty-five in block seven of said town of Cordova said Burkhart Alley was or ever has been an open public way; deny that said so-called Burkhart Alley was at said time or ever had been used by the public as a public way and deny that plaintiff Alice Johnson was induced to purchase said lot and premises by a continual public use of said so-called Burkhart Alley or any public use thereof. Defendants deny that if they obstruct or close that portion of said so-called Burkhart [11] Alley which lies between lots seven and eight in said block seven, said Alice Johnson will suffer great

and irreparable injury or loss or any injury or loss, and deny that the tenants of said building will be prevented from having free egress and ingress to and from said building and the business portion of said town of Cordova. Defendants deny that the rental value of the apartments of said building will be greatly reduced or reduced to any extent and deny that the value of said premises will be reduced fifty per cent or at all by the closing of that portion of said so-called Burkhart Alley lying between said lots seven and eight.

5.

Defendants admit the allegations contained in paragraph numbered five of said amended complaint.

6.

Answering paragraph numbered six of said amended complaint defendants deny that in the summer of the year 1908 or at any time the owners of said lots seven and eight and twenty-five and twenty-six in said block seven agreed to open an alley eight feet wide or of any width from First Street to Second Street in said town of Cordova, as alleged in paragraph numbered six of said amended complaint, or at all. Defendants deny that the owners of lot seven and lot twenty-six in said block seven or either of them ever gave four feet of their said lots or either of them for such alley and deny that the owners of lots eight and twenty-five of said block seven or that either of such owners ever gave four feet or any part of their said lots for said alley. Defendants deny that the

side-walls of the buildings erected by the owners of said lots seven and eight were constructed four feet from the side line of said lots, but allege that said buildings were erected with the side walls meeting and joining on the property line between said lots seven and eight, as such property line is shown on the plat and map of said town of Cordova, referred to and described in paragraph numbered five of said amended complaint, leaving a hallway on the street level through the buildings now owned by the defendants extending from First Street to the alley running north and south through said block seven, which hallway was left for the purpose of providing, and did provide side entrances [12] on the street level to said buildings on said lots seven and eight. Defendants deny that the buildings erected on said lots seven and eight were so constructed as to leave a public way eight (8) feet wide or of any width extending from First Street to Second Street, and deny that the owners of said lots were seven and eight at any time, in any manner, treated said hallway as a public highway. Defendants deny that it was ever agreed upon between the owners of said four lots or any of them that the four (4) foot strip referred to in said paragraph numbered six as having been given by A. E. Burkhart for said alley along the northerly side of lot twenty-five or any part thereof should be used for a walk on the levels of the floors of said building erected on said lot twenty-five.

7.

Answering paragraph numbered seven of said

amended complaint, defendants deny that said hallway through said buildings on said lots seven and eight was ever used by the general public or by the plaintiffs as a public street, alley or highway; but defendants allege that they and their predecessors in interest have at all times since the construction of their said buildings exercised dominion, possession and control over said hallway and have treated the same as a private property, paid taxes thereon and have been in open, notorious and exclusive possession thereof at all times since said buildings were erected.

8.

Answering paragraph numbered eight of said amended complaint defendants deny each and every allegation, matter and thing therein contained, except that on or about the fourteenth day of July, 1909, the municipality of the town of Cordova was duly incorporated and organized and the first meeting of the duly elected common council was held on said day, and that said municipality caused fire hydrants to be placed in First Street and Second Street at points approximately opposite said hallway which abuts upon First Street and the open space between said lots twenty-five and twenty-six which abuts upon Second Street.

9.

Answering paragraph numbered nine of said amended complaint, defendants deny each and every allegation therein contained, [13] except that on or about the eighth day of August, 1919, defendant H. A. Slater erected a fence or barrier

along the property line between said lots seven and eight and through said hallway, and that on or about the tenth day of September, 1919, defendant, Bank of Alaska, placed a fence or barrier along said property line between said lots seven and eight.

10.

Answering paragraph numbered ten of said amended complaint, defendants deny each and every allegation therein contained, except that the defendant H. A. Slater became the owner of lot seven of the said town of Cordova in the latter part of the year 1917, and that the defendant Bank of Alaska became the owner of lot eight in block seven in said town of Cordova in the year 1918.

11.

Answering paragraph numbered eleven of said amended complaint, defendants admit that at the times specified in said paragraph said hallway was obstructed by defendants in the manner alleged by plaintiffs but deny that such obstruction was unlawful or without right or authority and deny that defendants unlawfully claim the land occupied by said hallway as their private property, and defendants deny that the general public or the plaintiffs in this action have any right or authority to use said hallway as a public thoroughfare.

12.

Answering paragraph numbered twelve of said amended complaint, defendants deny each and every allegation, matter and thing therein contained.

13.

Answering paragraph numbered thirteen of plaintiffs' amended complaint, defendants deny that said so-called Burkhart Alley was ever laid out or used as a public street and deny each and every other allegation, matter and thing contained in said paragraph.

14.

Answering paragraph numbered fourteen of said amended complaint, defendants deny that plaintiffs are entitled to any remedy at law or in equity.
[14]

WHEREFORE, defendants having fully answered plaintiffs' amended complaint, pray that plaintiff take nothing by their amended complaint and that their action be dismissed, and that judgment be entered for the defendants for their costs and disbursements in this action.

EDWARD F. MEDLEY,

B. O. GRAHAM,

Attorneys for Defendants.

United States of America,

Territory of Alaska,—ss.

H. A. Slater, being first duly sworn, deposes and says: That he is one of the defendants in the above-entitled action; that he has read the foregoing answer, knows the contents thereof, and that the same is true as he verily believes.

H. A. SLATER.

Subscribed and sworn to before me this 4th day of October, A. D. 1919.

[Notarial Seal] EDWARD F. MEDLEY,
Notary Public for the Territory of Alaska.

My Commission expires Oct. 11, 1921.

Service is hereby accepted on the foregoing answer this 4th day of October, 1919.

DONOHOE & DIMOND,
Attorneys for Plaintiffs.

[Indorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 11, 1919. Arthur Lang, Clerk. By C. H. Wilcox, Deputy.
[15]

In the District Court for the Territory of Alaska,
Third Division.

No. C-173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SALTER and BANK OF ALASKA.

Reply.

Comes now the above-named plaintiffs and for reply to defendants' answer deny each and every allegation contained in said answer that in any manner controverts the allegations of plaintiffs' amended complaint, and deny each and every allegation contained in said answer by way of affirmative or new matter which in any way constitutes

a defense to any of the allegations contained in plaintiffs' amended complaint.

WHEREFORE plaintiffs pray a decree of this Honorable Court in accordance with the prayer contained in their amended complaint.

DONOHUE & DIMOND,
Attorneys for Plaintiffs.

United States of America,
Territory of Alaska,—ss.

A. E. Lathrop and Alice Johnson, each being first duly sworn, depose and say: That they have heard read the answer filed by defendants in the above-entitled cause; that they have read the foregoing reply and know the contents thereof and the same is true as they verily believe.

A. E. LATHROP.
ALICE JOHNSON.

Subscribed and sworn to before me this 4th day of October, 1919.

[Notarial Seal] R. H. L. NOAKS,
Notary Public for Alaska.

My Commission expires April 29, 1923.

The service of the foregoing reply is hereby accepted this — day of October, 1919.

EDWARD F. MEDLEY and
B. O. GRAHAM,
Attorneys for Defendant.

[Indorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 11, 1919. Arthur Lang, Clerk. By John B. Miller, Deputy.
[16]

In the District Court for the Territory of Alaska,
Third Division.

No. C-173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,

Defendants.

Decree.

This cause came on regularly for trial at Cordova, Alaska, on the 11th day of December, 1919, and was tried by the Court without a jury. Each of the plaintiffs being present in person and represented by their attorneys, Donohoe and Dimond, and the defendant H. A. Slater being present in person and represented by his attorney, Edward F. Medley, Esq., and the defendant Bank of Alaska, a corporation, being represented by its attorney, B. O. Graham, Esq., and the Court having heard all the testimony and the argument of counsel, took the matter under advisement and granted the attorneys of the respective parties the right to file briefs, and thereafter briefs were duly filed and given due consideration by the Court, and the Court after duly considering all the evidence introduced and being fully advised in the premises, did on the 1st day of March, 1920, render its written opinion in favor of the plaintiffs and against the defendants, and on the 26th day of May, 1920, made and

filed its written findings of fact and conclusions of law.

NOW, THEREFORE, it is ORDERED, ADJUDGED AND DECREED as follows:

FIRST: That Burkhart Alley, being a certain alley in the town of Cordova, Territory of Alaska, extending from First Street to Second Street in Block No. 7, of said town, is declared to be a public thoroughfare or alley. Said alley being eight (8) feet wide and two hundred fourteen (214) feet long, the center line of which is along the dividing line between Lots Nos. 7 and 8, and Lots Nos. 25 and 26, in said Block No. 7. And it is declared that the general travelling public and the above-named plaintiffs have a perpetual easement over and upon said alleyway for public travel, subject to the following limitations: That portion of said alleyway extending from the easterly line of First Street in a westerly direction, a distance of one hundred (100) feet, is eight (8) feet wide by twelve (12) feet high from [17] present floor of said alley, and that portion of said alley extending from the westerly side of Second Street in a westerly direction one hundred (100) feet, is eight (8) feet wide, less a space on the southerly side of said alleyway along the building erected on Lot No. 25, about twenty (20) inches wide, which space is occupied by a high walk along the floor of the first story of said building. Said alleyway is over and upon four (4) feet of the land along the southerly side of Lots Nos. 7 and 26 and over and along four (4) feet of the

northerly side of Lots Nos. 8 and 25, in Block No. 7 of the said town of Cordova.

SECOND: That said defendants H. A. Slater and Bank of Alaska, a corporation, are hereby perpetually enjoined and restrained from in any manner obstructing or closing said alley or any portion thereof as hereinabove described, and they and each of them, their officers, agents, servants or employees, or any person or persons holding by, under or through them, or either of them, are perpetually enjoined and restrained from in any manner whatever obstructing or closing any part or portion of said alley as hereinbefore described, or from doing any act or thing whatsoever that will in any manner interfere with or prevent the use of said alleyway as a public thoroughfare or highway, or with the free use and enjoyment by these plaintiffs and the general travelling public of the easement created by and upon the lots heretofore mentioned and described as a public alley or thoroughfare.

THIRD: That the plaintiffs and each of them do have and recover of and from the defendants and each of them the costs and disbursements incurred by plaintiffs in the prosecution of this suit, taxed at the sum of \$117.05. Said costs and disbursements to be taxed by the Clerk of the District Court, Third Judicial Division, Territory of Alaska, and when so taxed, to be inserted in the blank space left in this decree and to become a part thereof, and thereafter let execution issue in favor of plaintiffs and against defendants and each of them for

the amount of said costs and disbursements so taxed.

Done in open court his 26th day of May, 1920.

CHARLES E. BUNNELL,
Judge.

Service of the foregoing proposed decree is accepted by receiving a copy thereof this 22d day of March, 1920.

B. O. GRAHAM,
EDWARD F. MEDLEY,
Attorneys for Defendants.

Filed in the District Court, Territory of Alaska, Third Division. May 26, 1920. Arthur Lang, Clerk. By C. H. Wilcox, Deputy.

Entered Court Journal No. 12, page No. 812.
[18]

In the District Court for the Territory of Alaska,
Third Division.

No. C-173—IN EQUITY.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Corporation,

Defendants.

Petition for Appeal.

To the Honorable CHARLES E. BUNNELL, District Judge:

The above-named H. A. Slater, one of the de-

defendants herein, feeling himself aggrieved by the decree entered in this cause on the 26th day of May, A. D. 1920, and the above-named Bank of Alaska, a corporation, one of the defendants herein, feeling itself aggrieved by said decree, do hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors filed herewith, and they do pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of such court in such case made and provided.

And your petitioners further pray that the proper order relating to the required security to be required of them be made.

EDWARD F. MEDLEY,

B. O. GRAHAM,

Attorneys for said H. A. Slater, and Bank of Alaska. Address: Cordova, Alaska.

Filed in the District Court, Territory of Alaska, Third Division. Aug. 3, 1920. Arthur Lang, Clerk. By Thos. S. Scott, Deputy. [19]

In the District Court for the Territory of Alaska,
Third Division.

No. C-173—IN EQUITY.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,

Defendants.

Assignment of Errors.

Come now the defendants in the above-entitled cause and file the following assignment of errors upon which they will rely upon their prosecution of the appeal in the above-entitled cause, from the decree made by this Honorable Court on the 26th day of May, A. D. 1920:

1.

That the District Court for the Territory of Alaska, Third Division, erred in overruling defendants' objection to the following question propounded to Alice Johnson, one of the plaintiffs, called and sworn in her own behalf, and in permitting said witness to answer said question:

“Was the fact that Burkhart Alley was laid out and being used generally by the public one of the inducements that induced you to buy that property for \$5,000.00?” (Transcript of Testimony, p. 35.)

2.

Said Court erred in sustaining plaintiff's objec-

tion to the following question propounded by defendants' counsel to witness Bartley Howard and in refusing to permit said witness to answer said question:

"I wish you would explain what was done and said by the members of the council—what was said by the members of the council at that time in regard to raising the assessor's assessment on lots 7 and 8, block 7, from \$6,000.00 to \$7,500.00?" (Transcript of Testimony, p. 201.)

3.

Said Court erred in sustaining plaintiff's objection to defendants' offer in evidence of certified extract from the minutes of the common council of the town of Cordova, relating to motion made by the plaintiff Lathrop a member of the council:

"That the City Clerk be instructed to intervene in behalf of the city in this case." and in rejecting said offer. (Transcript of Testimony, p. 208.) [20]

4.

Said Court erred in permitting the witness A. E. Lathrop to answer the following question and in denying defendants' motion to strike out the witness' answer to said question:

"Q. And what condition does that leave the surface of the alley in the winter-time in regard to snow?

"A. It is impossible to get through." (Transcript of Evidence, p. 230.)

5.

Said Court erred in finding as a fact that part of Finding No. 1 which reads as follows:

“That each of said plaintiffs are particularly damaged in a manner special and different from the damage to the general public of the Town of Cordova, by the acts committed by the above-named defendants and in the acts threatened to be committed by the above-named defendants as hereinafter set forth.”

6.

Said Court erred in finding as a fact that part of Finding No. 1 which reads as follows:

“That plaintiffs bring this action . . . for and on behalf of the general public of the said town of Cordova.”

7.

Said Court erred in finding as a fact that part of Finding No. 3 which reads as follows:

“That if said defendants are permitted to obstruct said Burkhart Alley and to close the same to the travel of the general public and to this plaintiff, this plaintiff will be specially damaged thereby, by causing a reduction in the rental values of said buildings and this plaintiff's income therefrom, and will greatly depreciate the value of this plaintiff's said building and he will suffer irrevocable injury and loss.”

8.

Said Court erred in finding as a fact that part of Finding No. 4 which reads as follows:

“The only entrance to her said apartments in the basement story is off Burkhart Alley and the second story by walk from Second Street.”

9.

Said Court erred in finding as a fact that part of Finding No. 4 which reads as follows:

“At which time and for a great many years prior thereto, Burkhart Alley was and had been an open public way.” [21]

10.

Said Court erred in finding as a fact that part of Finding No. 4 which reads as follows:

“And was and had been continually used by the public as such.”

11.

Said Court erred in finding as a fact that part of Finding No. 4 which reads as follows:

“That if said defendants are permitted to obstruct the said Burkhart Alley and to close the same to travel by the general public and to the use of this plaintiff, this plaintiff will suffer irreparable injury and loss in her property rights in said lot and building.”

12.

Said Court erred in finding as a fact that part of Finding No. 4 which reads as follows:

“And the rental value of her apartments will be greatly depreciated and the value of her said lot and building will be greatly depreciated.”

13.

Said Court erred in finding as a fact that part of Finding No. 6 which reads as follows:

“And they agreed among themselves to open an alley 8 feet wide from First Street to Second Street in said town.”

14.

Said Court erred in finding as a fact that part of Finding No. 6 which reads as follows:

“That the owners of Lot No. 7 and Lot No. 26 in Block 7 gave 4 feet off the southerly side of their said lots for said alley.”

15.

Said Court erred in finding as a fact that part of Finding No. 6 which reads as follows:

“The owners of Lots Nos. 8 and 25, in Block No. 7, gave 4 feet of the northerly side of their said lots for said alley.”

16.

Said Court erred in finding as a fact that part of Finding No. 6 which reads as follows:

“That Burkhart Alley as herein described was originally opened up and ever since has been used and maintained.”

17.

Said Court erred in finding as a fact that part of Finding No. 7 which reads as follows:

“That said Burkhart Alley was first opened up to public travel about the month of October, 1908.” [22]

18.

Said Court erred in finding as a fact that part of Finding No. 7 which reads as follows:

“And it ever since has been used by the general public as a public highway.”

19.

Said Court erred in finding as a fact that part of Finding No. 7 which reads as follows:

“And ever since has continuously and without interruption, hindrance or permission of anyone been used as a public street, alley or highway by the general public and by these plaintiffs.”

20.

Said Court erred in finding as a fact that part of Finding No. 7 which reads as follows:

“And ever since has . . . without . . . permission of anyone been used as a public street, alley or highway by the general public and by these plaintiffs.”

21.

Said Court erred in finding as a fact that part of Finding No. 8 which reads as follows:

“The common council of the town of Cordova has exercised rights of ownership, authority, and control over Burkhart Alley without hindrance, objection or permission from anyone whomsoever.”

22.

Said Court erred in finding as a fact that part of Finding No. 8 which reads as follows:

“That the said common council has provided for the lighting of said Burkhart Alley a good portion of said time.”

23.

Said Court erred in finding as a fact that part of Finding No. 8 which reads as follows:

“And has supervised and required the sidewalk in said alley to be kept in good repair.”

24.

Said Court erred in finding as a fact that part of Finding No. 8 which reads as follows:

“And by numerous and other acts has exercised dominion and control over said Burkhart Alley from the time of the organization of said municipality until the present time.” [23]

25.

Said Court erred in finding as a fact that part of Finding No. 9 which reads as follows:

“That at no time since Burkhart Alley was opened to the public use as hereinbefore described have the owners of any of the four lots abutting on said ally claimed or contended that said alley was not a public highway until defendant Slater herein on the 8th day of August, 1919, and the defendant Bank of Alaska, on the 10th day of September, 1919, attempted to obstruct and close said Burkhart Alley and prevent the public and these plaintiffs from the free use and enjoyment thereof.”

26.

Said Court erred in finding as a fact that part of Finding No. 10 which reads as follows:

“That at the time each of said defendants purchased their respective lots, said Burkhart Alley was a public highway.”

27.

Said Court erred in finding as a fact that part of Finding No. 10 which reads as follows:

“And has been continuously used by the general public since the year 1908 as a public highway.”

28.

Said Court erred in finding as a fact that part of Finding No. 10 which reads as follows:

“And each of said defendants has full knowledge of said fact.”

29.

Said Court erred in finding as a fact that part of Finding No. 11 which reads as follows:

“That on the 8th day of August, 1919, defendant H. A. Slater unlawfully and without right or authority obstructed the free use and enjoyment of Burkhart Alley.”

30.

Said Court erred in finding as a fact that part of Finding No. 11 which reads as follows:

“That each of said defendants unlawfully claimed the right to close and obstruct Burkhart Alley.”

31.

Said Court erred in finding as a fact that part of Finding No. 12 which reads as follows:

“That if said defendants or either of them is permitted to obstruct and close said Burkhart Alley and prevent these plaintiffs and the general public from the free use and enjoyment of said Burkhart Alley, these plaintiffs will suffer great and irreparable injury and loss in their property rights.” [24]

32.

Said Court erred in finding as a fact that part of Finding No. 12 which reads as follows:

“And the travelling public of the town of Cordova will suffer great inconvenience, loss and damage.”

33.

Said Court erred in finding as a fact that part of Finding No. 13 which reads as follows:

“That more than ten (10) years have elapsed since said Burkhart Alley was laid out and first used as a public street, prior to the time either of these defendants first asserted or claimed the right to close said alley or any portion thereof.”

34.

Said Court erred in finding as a fact that part of Finding No. 13 which reads as follows:

“And during all of said time, said Burkhart Alley was continuously and without interruption used by and in the exclusive possession of the inhabitants, residents and general public of the said town of Cordova, as a public street or alley.”

35.

Said Court erred in finding as a fact that part of Finding No. 13 which reads as follows:

“With the knowledge and acquiescence at all times of the owners of all of said lots crossed by said alley and without license or permission of, hindrance or objection from, any person or persons whomsoever.”

36.

Said Court erred in finding as a fact that part of Finding No. 13 which reads as follows:

“And that such use and possession by the public of said alley as a public alley was during all of said time, adverse, hostile, continuous, exclusive and under color and claim of right.”

37.

Said Court erred in finding as a fact that part of Finding No. 13 which reads as follows:

“That the common council of the town of Cordova, shortly after said Burkhart Alley was first opened to public travel and use as hereinbefore stated, accepted said alley as a public thoroughfare by lighting the same.”

38.

Said Court erred in finding as a fact that part of Finding No. 13 which reads as follows:

“That the common council of the town of Cordova . . . accepted said alley as a public thoroughfare by . . . keeping the same clear from all obstructions.” [25]

39.

Said Court erred in finding as a fact that part of Finding No. 13 which reads as follows:

“That the common council of the town of Cordova . . . accepted said alley as a public thoroughfare by . . . requiring the sidewalk in said alley to be kept in good repair.”

40.

Said Court erred in finding as a fact that part of Finding No. 13 which reads as follows:

“And generally exercised supervision, control and ownership over said alley and continued to do so to the present time.”

41.

Said Court erred in finding as a fact that part of Finding No. 13 which reads as follows:

“That the travel and use of said alley by the general public passing through said alley and over and upon the same far exceeded the travel on either ‘B’ or ‘C’ Street between First and Second Street during all the time hereinbefore mentioned.”

42.

Said Court erred in concluding and adopting that part of Conclusion of Law No. 1 which reads as follows:

“That said Burkhardt Alley in the month of October, 1908, became and ever since has been and now is a public thoroughfare or alley by reason of an implied dedication arising from the acts of the owners of Lots Nos. 7 and 8 and Lots Nos. 25 and 26, in Block No. 7, in the town of Cordova.”

43.

Said Court erred in concluding and adopting Conclusion of Law No. 2 which reads as follows:

“That said Burkhardt Alley as described in the foregoing findings of fact, at the time when

said defendants attempted to obstruct a portion of said alley, to wit, on the 8th day of August, 1919, and on the 10th day of September, 1919, was, and ever since has been, and now is, a public thoroughfare and alley by prescription, the same having been used exclusively and continuously by the general public of the town of Cordova for a period of more than ten years prior to the said 8th day of August, 1919, under color of title and claim of right, and adverse and hostile to the owners of the respective lots over which said alley passes and with the knowledge and acquiescence of said owners but without their license or permission, and without any objections from them or any of them."

44.

Said Court erred in concluding and adopting that part of Conclusion of Law No. 2 which reads as follows:

"That said Burkhart Alley as described in the foregoing findings of fact was at the time when said defendants attempted to obstruct and close a portion of said alley, to wit, on the 8th day of August, 1919, and on the 10th day of September, 1919, was, and ever since has been and now is a public thoroughfare and alley by prescription." [26]

45.

Said Court erred in concluding and adopting Conclusion of Law No. 3 which reads as follows:

"That plaintiffs are entitled to have said Burkhart Alley, as described in the foregoing

findings of fact, maintained and kept free from obstructions and continuously open for the free and uninterrupted travel and use by these plaintiffs and the general public of the town of Cordova, as a public thoroughfare or alley."

46.

The Court erred in concluding and adopting that part of Conclusion of Law No. 4 which reads as follows:

"That these plaintiffs are entitled to have said defendants and each of them enjoined from in any manner obstructing or closing said Burkhart Alley as described in the foregoing findings of fact where the same passes upon and over Lots Nos. 7 and 8, in Block No. 7, in said town of Cordova."

47.

Said Court erred in concluding and adopting Conclusion of Law No. 4 which reads as follows:

"That these plaintiffs are entitled to have said defendants and each of them enjoined from in any manner obstructing or closing said Burkhart Alley as described in the foregoing findings of fact where the same passes upon and over Lots Nos. 7 and 8, in Block No. 7, in said town of Cordova, to wit: An alley eight (8) feet wide, the center of which is the dividing line between Lots Nos. 7 and 8, in Block No. 7, and twelve (12) feet high for the entire length of Lots Nos. 7 and 8, and from in any manner whatever obstructing or closing said alley or

any part or portion thereof or in any manner interfering with the free use and enjoyment thereof as a public highway as the same was when first laid out and opened to public use and travel and ever since has been used and traveled by the public.”

48.

Said Court erred in concluding and adopting Conclusion of Law No. 5, or the order contained in paragraph No. 5, of said Conclusions of Law, if same is intended as an order, which Conclusion of Law reads as follows:

“That plaintiffs have decree against defendants and each of them in accordance with their prayer of their amended complaint and in accordance with the foregoing conclusions of law and have judgment against said defendants and each of them for the costs and disbursements incurred in this action by plaintiffs.” [27]

49.

Said Court erred in entering its decree and judgment in favor of the plaintiffs and against the defendants on the 26th day of May, 1920, for the reason that said decree and judgment is contrary to law and is not supported by the findings of fact or conclusions of law, pleadings or evidence in this cause.

WHEREFORE, by reason of the errors assigned, the appellants herein, said H. A. Slater and Bank

of Alaska, a corporation, pray that said decree and judgment be reversed.

EDWARD F. MEDLEY,
B. O. GRAHAM,

Attorneys for Defendants H. A. Slater and Bank
of Alaska, a Corporation.

Address: Cordova, Alaska.

Filed in the District Court, Territory of Alaska,
Third Division. Aug. 3, 1920. Arthur Lang, Clerk.
By Thos. S. Scott, Deputy. [28]

In the District Court for the Territory of Alaska,
Third Judicial Division.

No. C—173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,

Defendants.

Order Approving Bond.

It appearing to me that the appellants have filed
a good and sufficient cost bond herein, the sufficiency
thereof is hereby approved.

CHARLES E. BUNNELL,
District Judge.

Dated Fairbanks, Alaska, Nov. 12, 1920.

Filed in the District Court, Territory of Alaska,

Third Division. Nov. 13, 1920. Arthur Lang,
Clerk.

Entered Court Journal No. 13, page No. 59. [29]

In the District Court for the Territory of Alaska,
Third Judicial Division.

No. C—173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,

Defendants.

Order Allowing Appeal.

Petition of defendants H. A. Slater and Bank of Alaska, a Corporation, for allowance of an appeal to the United States Court of Appeals for the Ninth Circuit, from the final decree entered in the above-entitled court and cause on May 26th, 1920, together with assignment of errors relied upon by defendants upon their prosecution of said appeal and prayed for reversal of said decree, having been filed on August 16th, 1920:

IT IS ORDERED THAT SAID APPEAL to the United States Circuit Court of Appeals for the Ninth Circuit from said final decree be and the same hereby is allowed said defendants, and that a certified transcript of the record, testimony, exhibits, stipulations and all other proceedings in said

cause be herewith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that the bond on appeal be fixed at the sum of ONE THOUSAND DOLLARS.

Dated at Fairbanks, Alaska, November 12th, 1920.

CHARLES E. BUNNELL,

District Judge.

Filed in the District Court, Territory of Alaska, Third Division. Nov. 13, 1920. Arthur Lang, Clerk.

Entered Court Journal No. 13, page No. 59. [30]

Filed in the District Court, Territory of Alaska, Third Division. Nov. 13, 1920. Arthur Lang, Clerk. By Aaron E. Rucker, Deputy.

In the District Court for the Territory of Alaska,
Third Judicial Division.

No. C—173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Corporation,

Defendants.

Citation.

United States of America,—ss.

The President of the United States to A. E. Lathrop
and Alice Johnson, and Their Attorneys,
GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, California, within thirty days from the date of this writing pursuant to an order allowing an appeal filed and of record in the office of the Clerk of the District Court for the Territory of Alaska, Third Division, wherein H. A. Slater and Bank of Alaska, a corporation, are appellants, and you, the said A. E. Lathrop and Alice Johnson, are appellees, to show cause if any there be, why the final decree rendered against said appellants and signed, filed and entered on May 26, 1920, in that certain suit being in equity Number C—173, wherein the said A. E. Lathrop and Alice Johnson are plaintiffs and said H. A. Slater and Bank of Alaska, a corporation, are defendants as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice [31] of the Supreme Court of the United States, this 12th day of November, 1920.

CHARLES E. BUNNELL,
Judge of the District Court for the Territory of
Alaska. [32]

In the District Court for the Territory of Alaska,
Third Division.

No. C-173—IN EQUITY.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,

Defendants.

Acknowledgment of Service of Citation.

Service of the citation on appeal issued in the above-entitled cause by Hon. Charles E. Bunnell, Judge of the District Court for the Territory of Alaska, on November 12th, 1920, by receipt of a true copy thereof, is hereby acknowledged at Cordova, Alaska, this 19th day of November, 1920.

DONOHOE & DIAMOND,

By T. J. DONOHOE,

Attorneys for A. E. Lathrop and Alice Johnson,
Plaintiffs. [33]

Filed in the District Court, Territory of Alaska,
Third Division. Nov. 10, 1920. Arthur Lang,
Clerk. By ———, Deputy.

In the District Court for the Territory of Alaska,
Third Division.

No. C-173—IN EQUITY.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,
Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, H. A. Slater, and Bank of Alaska, as
principals, and Chas. J. Goodall and Bartley How-
ard, of Cordova, Alaska, as sureties, are held and
firmly bound unto A. E. Lathrop and Alice John-
son, the plaintiffs above named, in the sum of One
Thousand Dollars (\$1,000.00), to be paid said A. E.
Lathrop and Alice Johnson, and their respective
executors, administrators, successors and assigns, to
which payment, well and truly to be made, we bind
ourselves and each of our executors, administrators
and personal representatives, jointly and severally,
firmly by these presents.

Sealed with our seals and dated this 8th day of
November, A. D. 1920.

The condition of the above obligation is such that,—

WHEREAS, the above-named defendants, H. A. Slater and Bank of Alaska have petitioned for an appeal to the United [34] States Circuit Court of Appeals for the Ninth Circuit, to reverse the final decree made and entered in the above-entitled cause of the 26th day of May, A. D. 1920, by the District Court for the Territory of Alaska, Third Division.

NOW, THEREFORE, if the above-named defendants, H. A. Slater and Bank of Alaska, shall prosecute said appeal to effect and shall answer all costs that may be awarded against them, if they shall fail to make their plea good, then this obligation shall be void; otherwise to remain in full force and effect.

H. A. SLATER,
By B. O. GRAHAM,
His Attorney,
BANK OF ALASKA,
By B. O. GRAHAM,
Its Attorney,
Principals.
CHAS. J. GOODALL,
BARTLEY HOWARD,
Sureties. [35]

United States of America,
Territory of Alaska,—ss.

Chas. J. Goodall, being first duly sworn on oath, deposes and says:

I am one of the sureties named in and who ex-

ecuted the foregoing bond. I am a resident within the Territory of Alaska, and am worth the sum of One Thousand Dollars (\$1,000.00), exclusive of property exempt from execution and over and above all just debts and liabilities. I am not a counselor or attorney at law, marshal, commissioner, clerk of any court or other officer of any court.

CHAS. J. GOODALL.

Subscribed and sworn to before me this 8th day of November, A. D. 1920.

[Seal]

B. O. GRAHAM,

Notary Public for the Territory of Alaska.

My commission expires April 24, 1922.

United States of America,

Territory of Alaska,—ss.

Bartley Howard, being first duly sworn, on oath, deposes and says:

I am one of the sureties named in and who executed the foregoing bond. I am a resident within the Territory of Alaska, and am worth the sum of One Thousand Dollars (\$1,000.00), exclusive of property exempt from execution and over and above all just debts and liabilities. I am not a counselor or attorney at law, marshal, commissioner, clerk of any court or other officer of any court.

BARTLEY HOWARD.

Subscribed and sworn to before me this 8th day of November, A. D. 1920.

[Seal]

B. O. GRAHAM,

Notary Public for the Territory of Alaska.

My commission expires April 24, 1922. [36]

In the District Court for the Territory of Alaska,
Third Division.

No. C—173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,

Defendants.

Bill of Exceptions.

Come now the above-named defendants, H. A. Slater and Bank of Alaska, a corporation, and, being about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree made and entered herein by the District Court for the Territory of Alaska, Third Division, on the 26th day of May, 1920, files herein and petitions and prays said District Court to settle, certify and make a part of the record herein upon such appeal, the hereinafter mentioned proceedings, objections, rulings and exceptions, all of which appear of record herein and are hereinafter fully set forth, said proceedings, objections, rulings and exceptions appearing in the following described records, files, papers and proceedings, filed, had and done herein, hereunto attached and made a part hereof, to wit:

Transcript of the Record of Evidence and Proceedings had at trial, certified by the Official Court Stenographer. [37]

Decision and Opinion of the Trial Court.

Findings of Fact and Conclusions of Law.

Defendants' Exceptions to Findings of Fact and
Conclusions of Law.

Order Allowing Exceptions.

Order Enlarging Time for Filing and Serving Bill
of Exceptions to August 20, 1920.

Order Settling and Certifying Bill of Exceptions.

EDWARD F. MEDLEY.

B. O. GRAHAM,

Attorneys for Defendants.

Service of the foregoing proposed bill of exceptions and of all papers, records and proceedings therein mentioned, by receipt of copy, thereof, acknowledged at Valdez, Alaska, this 18th day of August, 1920.

DONOHOE & DIMOND,

By ANTHONY J. DIMOND,

Attorneys for Plaintiffs.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Aug. 18, 1920. Arthur Lang, Clerk. By _____, Deputy.

[38]

In the District Court for the Territory of Alaska,
Third Division.

No. C/173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,
Defendants.

Transcript of Evidence.

BE IT REMEMBERED, that the above-entitled cause came on duly and regularly to be heard at Cordova, Alaska, in said Division and Territory, on Thursday, the 11th day of December, 1919, before the Honorable CHARLES E. BUNNELL, Judge of said court:

The plaintiffs being represented by their attorneys and counsel, Messrs. DONOHUE & DIMOND.

The defendants being represented by their attorneys and counsel, B. O. GRAHAM, Esq., and E. F. MEDLEY, Esq.:

WHEREUPON the following proceedings were had and done, to wit: [39]

In the District Court for the Territory of Alaska,
Third Division.

No. C/173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,

Defendants.

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Mr. MEDLEY.—It was stipulated between the attorneys for the plaintiffs and defendants to take the deposition of Robert Ashland, who lives in Vancouver. Interrogatories, direct and cross, were prepared and under the stipulation sent to a firm of lawyers in Vancouver, requesting that the deposition be taken. They were returned and after a while were published by stipulation of the attorneys. Later we discovered that through an error there were six of the cross-interrogatories omitted from the deposition. Immediately that was called to my attention I made a new stipulation with Mr. Donohoe and we sent them back to this same firm of lawyers, requesting they complete the deposition, and calling their attention to the error. On the last boat, I think it was, I got a letter from these attorneys saying they had completed the deposition and sending me a copy of the answers to the last six interrogatories. The original copy of the deposition has not yet arrived here and yesterday I wired the Clerk of the court at Valdez asking if it had been received there but I have not yet received an answer. Now, the defendants are willing to go ahead with this case but they feel that the testimony of Ashland is important and would like to have it agreed that the Court may consider the deposition with the files in the case when received. There has been no wilful delay and it may be that Mr. Donohoe will agree that the copy I have may serve as answers to the six interrogatories for the original. I will take that up with him during the noon hour.

Mr. DONOHOE.—I think very likely we can

agree but I have not seen the copies. We can decide at noon whether we can agree or not. I have no objection to the Court considering these depositions when they come. [41—2]

Mr. DONOHOE.—You have read the pleadings, your Honor?

The COURT.—Yes.

Mr. DONOHOE.—Then we will not make any opening statement.

Mr. MEDLEY.—We have no statement to make.

Mr. DONOHOE.—I have a diagram here, a plat, copy of which is attached to the complaint, and it has been stipulated orally between counsel so as to avoid the necessity of bringing a surveyor into court that this is a correct diagram or plat of the various points referred to in the pleadings, with one exception, that the west half of Burkhart Alley, extending from First Avenue to the alley running north and south through the block, the regular alley, that this plat does not show the overhead part—that alley is covered. I will now call Mr. Lathrop. [42—3]

Testimony of Austin E. Lathrop, in His Own Behalf.

AUSTIN E. LATHROP, called and sworn as a witness in his own behalf, testified as follows:

Direct Examination.

(By Mr. DONOHOE.)

Q. State your name and residence.

A. Austin E. Lathrop; Cordova, Alaska.

Q. When did you first take up your residence in Cordova?

(Testimony of Austin E. Lathrop.)

A. Do you call Eyak Cordova?

Q. No, I mean the town of Cordova.

A. I came here in the summer, along about September, the year the town was opened,—1908, I think.

Q. You are one of the plaintiffs in this case?

A. Yes, sir.

Q. Have you lived in Cordova since 1908 with the exception of the short period you lived in Anchorage? A. Yes, sir.

Q. What years was it you lived in Anchorage?

A. I went over there in 1916, when the town started—1915 and '16.

Q. During the time you lived in Anchorage were you off and on in Cordova?

A. I was in business here most all of the time—I was in business all the time. I have reference to the Transfer Company.

Q. That was your business in Cordova the first years you were living here?

A. Yes, transfer business.

Q. You are acquainted with your codefendant, Alice Johnson? A. Yes, sir.

Q. You are acquainted with Mr. H. A. Slater?

A. Yes, sir.

Q. And the Bank of Alaska? A. Yes, sir.
[43—4]

Q. Are you the owner of Lots 24, 25 and 26 in Block 2 of the town of Cordova? A. Yes, sir.

Q. Have you within recent years constructed a building on these lots? A. I have.

(Testimony of Austin E. Lathrop.)

Q. What is the size of that building?

A. 75 by 100, three stories, on First Avenue.

Q. Is it a substantial building? A. It is.

Q. And approximately what was the cost of that structure?

A. The building isn't complete but I have over \$100,000 already invested.

Q. What are the businesses occupying the first floor of the building on First Avenue?

A. Well, first would be the main entrance to the Empress Theatre; the next is the Style Shop owned by Miss Helen Bell, and the next is occupied by two stores, the Admiral Line Steamship office and the Bludhorn jewelry store. The third store is not occupied yet.

Q. Miss Bell, the store she occupies, is for women's goods? A. Yes, sir.

Q. And the next store is partly occupied by a jewelry store? A. Yes, sir.

Q. What have you on the first floor, upstairs?

A. We have a dentist's office, United States cable office and two physicians, and apartments.

Q. Are the apartments occupied?

A. Yes, sir.

Q. What have you on the third floor?

A. Apartments. [44—5]

Q. Are the apartments occupied?

A. Yes, sir.

Q. Could you approximately state the number of tenants you have in the building at this time?

(Testimony of Austin E. Lathrop.)

A. You mean the number of people occupying the building?

Q. Yes, the number of people occupying the building, approximately?

A. I would say between forty and fifty.

Q. Are you acquainted with the property occupied by Alice Johnson, Lot 25 in Block 7 of the town of Cordova? A. Yes, sir.

Q. What structures are on this lot?

A. I think there is a building on it between 20 and 21 feet front and 100 feet deep.

Q. What structures are on it, I asked you, what buildings?

A. I say a building about 21 feet wide by 100 feet deep.

Q. How many stories?

A. Two stories and a basement.

Q. What is the main portion of this building used for? A. It is an apartment house.

Q. Is there a cross-walk maintained by the city extending from the westerly terminus of Burkhart Alley to the westerly side of First Street?

A. Yes, sir.

Q. In relation to your building where does that sidewalk run on the westerly side of First Street, that cross-walk?

A. I would say right in front of Helen Bell's Style Shop.

Q. Are you acquainted with what is known as Burkhart Alley? A. Yes, sir.

Q. What would you say would be the damages or

(Testimony of Austin E. Lathrop.)

the reduced price of your building you have described and the reduced price of [45—6] the rental values of the various stores and apartments in your building if the westerly half of Burkhart Alley should be closed, and by the westerly half I mean that portion of Burkhart Alley extending from First Street in a westerly direction 100 feet to the regular alley running north and south in Block 7, and also if the cross-walk extending from the westerly terminus of Burkhart Alley acrossed First Avenue was taken up?

Mr. GRAHAM.—We object to the question as irrelevant. The defendants have nothing whatever to do with the cross-walk put in by the city across First Street—the defendants have no control over it and would have nothing to do with it, nothing to do with putting it in, and it does not in any way affect their property—they cannot be bound by something they cannot object to.

Mr. DONOHOE.—If the city only maintains cross-walks at the intersection of streets and it can be proved by testimony in this case that at one time there were three cross-walks acrossed First Street along Block 7, one in front of the Boyle Drugstore, one in front of Clayson's and one extending from the westerly terminus of Burkhart Alley, and the City Council ordered the other two walks taken up, and this witness now on the stand can testify that the reason the cross-walks were taken up was because they were not at the intersection of any street, it seems to me it is competent evidence.

(Testimony of Austin E. Lathrop.)

The COURT.—The objection will be overruled and exception allowed. If it does not become pertinent the Court will entertain a motion to strike.

A. In dollars and cents it would be almost impossible for me to arrive at the damages. The cross-walk is just as essential to that building as the walk almost in front of the building. The value of that cross-walk you might refer to it in a smaller way by [46—7] the fact that Clayson placed a great value on his walk, only 50 or 55 feet from this regular walk—

Mr. GRAHAM.—We object to that form of answer and not responsive.

Q. Confine yourself to your judgment whether it would materially damage your values there or otherwise.

A. It certainly would materially damage the business in that building. It has always been considered that there was one side to First Avenue, one side of the street.

Q. You mean the greater portion of travel followed one side? A. Yes, sir.

Q. Which side of First Avenue?

A. That would be the east side, the opposite side from our building. That is the side that has had in the past the travel and it has been uphill work to build or open or maintain a business—

Mr. MEDLEY.—We object to that as not responsive.

The COURT.—He may proceed.

Q. How do you arrive at the opinion that it would

(Testimony of Austin E. Lathrop.)

materially damage the values of your property if this alley was closed and that cross-walk removed?

A. Well, the travel that takes place over that walk—you will notice after the picture show is out, probably, well I would say 75% of the attendants cross that walk. If we had no walk there I am satisfied that the picture show and other businesses as well as the parties would suffer.

Q. Do you know of any other cross-walk being acrossed First Street some time before this?

A. Yes, sir.

Q. Where were those cross-walks?

A. There was one built by Clayson—

Q. How far is that in relation to the cross-walk in front of your building? [47—8]

A. Seventy-five feet.

Q. To the north? A. To the north.

Q. Do you know of any other cross-walk?

A. The Cordova Drugstore.

Q. Where is that in relation to yours?

A. That is south of the main cross-walk.

Q. How far approximately?

A. Nearly 100 feet.

Q. Do you know of these two cross-walks being removed? A. Yes, sir.

Q. By whose orders? A. By the City.

Q. For what reason?

Mr. GRAHAM.—We object to that as incompetent.

Objection overruled; defendants allowed an exception to the ruling.

(Testimony of Austin E. Lathrop.)

Q. For what reason were those walks removed—why were they removed?

A. I think the basis of the complaint was to vehicles and transfer teams traveling there.

Q. Have these cross-walks been removed at the intersection of any street coming on to First Avenue?

A. No.

Mr. MEDLEY.—We object to that as incompetent, irrelevant and immaterial, and move to strike the answer.

Objection overruled and motion denied; defendants allowed an exception.

Q. Are you acquainted with the property owned by your coplaintiff, Alice Johnson, situated on Lot 25 in Block 7, Cordova? Do you know the nature of the buildings on the property?

A. Yes, sir. [48—9]

Q. What in your judgment would be the depreciation caused to this property and the value of the property and in the rental incomes derived from the property should Burkhart Alley be closed on the westerly end, where it passes through and over a portion of Lot 7 in Block 7?

Mr. MEDLEY.—We object to that as incompetent, irrelevant and immaterial, and requiring an expert opinion, for which this witness is not qualified.

Objection overruled and defendants allowed an exception. A. At least 50%.

Q. What would be your reasons or basis for that opinion?

(Testimony of Austin E. Lathrop.)

A. As the property stands now it is practically First Avenue property—it is accessible from First Avenue.

Q. Is First Avenue the main business street of the town of Cordova? A. Yes, sir.

Q. What do you mean by that, is First Avenue property now?

A. It is nearer to First Avenue, being able to use the alley.

Q. By being able to use the Burkhart Alley?

A. Yes, sir.

Q. Were you a resident of the town of Cordova in the summer and fall of the year 1908?

A. Yes, sir.

Q. And I believe you stated you were in the transfer business at that time? A. Yes, sir.

Q. Do you know of Robert Ashland constructing a building on Lot 7 in Block 7 of the town of Cordova in the summer and fall of the year 1908?

A. Yes, sir.

Q. Do you know how he constructed the south wall of this building in reference to the south line of Lot 7 in Block 7 of Cordova? [49—10]

A. He set his wall back.

Q. How far?

A. Well, I think it was four feet.

Q. And did he leave a strip along the full length of Lot 7, Block 7, or on the southerly side line, four feet wide? A. Yes.

Q. On the ground floor?

A. On the ground floor.

(Testimony of Austin E. Lathrop.)

Q. That is, on the street level of First Avenue?

A. Yes, sir.

Q. Were you in Cordova when Mr. Burkhart constructed a building on Lot 8 in Block 7, of the town of Cordova, in the summer or fall of 1908?

A. Yes, sir.

Q. How did he construct the north wall of this building with reference to the north side line of Lot 8, Block 7, of the town of Cordova?

A. He set his building back four feet or about that.

Q. That is on the street level of First Avenue, the ground floor; is that right? A. Yes, sir.

The COURT.—Does that extend back through the entire lot—does the four feet strip extend back through the entire lot?

A. The 100 feet; yes, sir.

Q. It extends back from First Avenue to the regular alley running north and south through Block 7?

A. Yes, sir.

Q. A four-foot strip left on each of the two lots, making an eight-foot strip, the centre of which was along the dividing line between Lots 7 and 8? [50—11] A. Yes, sir.

Q. What was done with that eight-foot strip, for what purpose was it used?

A. As a public highway.

Mr. GRAHAM.—We object to that and move it be stricken as calling for a calling of the witness.

Motion granted—answer stricken.

Q. What use was put of that eight-foot strip between these two buildings?

(Testimony of Austin E. Lathrop.)

A. At that time Lindig had a cafe in the rear of the Ashland Building and I don't recall what business was in the rear of the building occupied by the Bank of Alaska now. There was some business in there and there was some rooms for rent upstairs there, over the Ashland Building and Mr. Ashland had a saloon at that time.

Q. You haven't answered my question. I asked you what was done or what use was made of the eight-foot strip left between the walls of the two buildings?

A. It was used as a public highway for those people to reach these public places of business, these particular places.

Mr. GRAHAM.—We make the same objection.

The COURT.—That portion of the answer may be stricken. What was it used for? Your answer that it was a public highway is in the nature of a conclusion—what was this strip used for, without using the term public highway?

A. We handled our freight through there; we unloaded liquor, etc., and people passed through back and forth.

Q. Now, then, Lot 26 in Block 7, which was the property in which M. Finklestein in the fall of 1908 opened up a clothing store— A. Yes.

Q. Are you familiar with the building which was erected on this [51—12] lot in the summer of 1908? A. Yes, sir.

Q. How was the south wall of this building erected with reference to the south wall of Lot 26?

(Testimony of Austin E. Lathrop.)

A. It stood back four feet.

Q. Then the south wall of the building was set back four feet from the side line of the lot?

A. Yes, sir.

Q. How was the building erected on Lot 25 which is now the Alice Johnson property, how was it erected in reference to the north line of Lot 25?

A. It stood back four feet.

Q. Did this make a passageway leading from First Avenue to Second Avenue, 8 feet wide?

A. Yes, sir.

Q. Now, what was that alleyway from First Street to Second Street used for and by whom was it used?

A. It was used by the public and by the owners of the property.

Q. Could you say whether the public have constantly used this alley from that time on?

A. They have.

Q. What would you say was the amount of travel through and over this alley from the fall of 1908 until the fall of 1919 in reference to the amount of travel that passed up and down East B Street and C Street, between First and Second Avenues?

A. During the time the postoffice was on Second Avenue a conservative estimate would be 80%.

Q. Eighty per cent of the travel?

A. Yes.

Q. Between First and Second Avenue, passed through Burkhart Alley? [52—13]

A. Yes, sir.

(Testimony of Austin E. Lathrop.)

Q. Where was the postoffice situated at that time?

A. In what is known as the Ostrander Building.

Q. What years was the postoffice situated in the Ostrander Building?

A. I would have to guess at that. The postoffice originally was in what is known as the Alaskan now the McCormick Hotel, and I believe was moved—I am not sure, I think the Ostrander Building was built in 1909 and the postoffice moved up there shortly afterwards.

Q. How long did it remain after 1909 in the Ostrander Building?

A. It remained there until they moved down to where they are at the present time. I wasn't here when they moved—it is about a year now, not quite a year.

Q. What would you say as to the amount of travel that passes through and over Burkhart Alley between First and Second Avenues since the postoffice was moved from Second Avenue to First Avenue?

A. Well, I would say forty to fifty per cent.

Q. Of the travel between First and Second Avenues? A. Yes.

Mr. DONOHOE.—If the Court please, I want to withdraw this witness for a moment and put Mr. Hesse on the stand.

The COURT.—Very well.

Witness excused. [53—14]

Testimony of W. A. Hesse, for Plaintiff.

W. A. HESSE, a witness called and sworn in behalf of the plaintiffs, testified as follows:

Direct Examination.

(By Mr. DONOHOE.)

Q. What is your name?

A. W. A. Hesse.

Q. Where do you reside? A. Cordova.

Q. What is your business or occupation?

A. Mining engineer.

Q. Are you also a surveyor? A. Yes, sir.

Mr. MEDLEY.—We admit Mr. Hesse's qualifications to make a map and his ability.

Q. Did you some time in the month of September make a map of a certain portion of the town of Cordova in reference to Burkhart Alley, at my request?

A. No, sir; it was in the month of August.

Q. Did you make that map from a survey actually made of the ground? A. Yes, sir.

Mr. DONOHOE.—I ask that this map be marked Plaintiff's Exhibit "A" for Identification.

(It is so marked.)

Q. I hand you a plat, marked Plaintiffs' Exhibit "A" for Identification, and ask you if that is the plat you prepared of Burkhart Alley. A. Yes, sir.

Q. Does this plat correctly show the building of A. E. Lathrop on the westerly side of First Avenue in the town of Cordova? A. Yes, sir.

Q. Does it correctly show the sidewalk on the west-

(Testimony of W. A. Hesse.)

erly side of the town of Cordova in front of the Lathrop Building? [54—15]

A. Yes, I think it does.

Q. And the fire hydrant set on the westerly side of First Avenue close to the cross-walk acrossed First Avenue? A. Yes, sir.

Q. And the cross-walk, being from the westerly terminal of Burkhart Alley, acrossed First Street—is that correctly described and shown? A. Yes, sir.

Q. And does it correctly show Lots 7 and 8, 25 and 26 in Block 7 in the town of Cordova?

A. Yes, sir; I believe it does.

Q. And does it correctly show Burkhart Alley leading from First Avenue to Second Avenue through Block 7 in the town of Cordova? A. Yes.

Q. And does it correctly show the street line on the westerly side of Second Avenue? A. Yes, sir.

Q. And the fire hydrant on the easterly side of Second Avenue? A. Yes, sir.

Mr. DONOHUE.—We offer the plat in evidence and ask that it be marked Plaintiffs' Exhibit "A."

Mr. MEDLEY.—We have no objection to the plat but I want a little explanation. I will ask the witness a few questions.

The COURT.—Very well.

(By Mr. MEDLEY.)

Q. This plat doesn't show the overhead structure on Lots 7 and 8? A. No, sir.

Q. I would like to call your attention to the cross-walk over First Street—isn't this sidewalk continued right through here?

(Testimony of W. A. Hesse.)

A. That sidewalk is continued through; yes, sir.
[55—16]

Q. That sidewalk is continued through—that map is not accurate—it doesn't show the actual construction of this sidewalk right through?

A. That sidewalk, of course, the curb line, is continuous. I didn't think at the time I made it that—it would probably be better to show the curb line as being continuous.

Q. Is it the same on both sides of First Avenue, the cross-walk?

A. I think it is. Without you indicate the curb outline it would probably be a better delineation to show the cross-walks as continuous.

Mr. MEDLEY.—*We* these exceptions the defendants have no objection.

The COURT.—I understand the curb line is continuous on the main street? A. Yes, sir.

The plat is admitted in evidence as Plaintiffs' Exhibit "A"; is attached hereto and made a part hereof. (By Mr. DONOHOE.)

Q. Mr. Medley asked you as to whether Plaintiffs' Exhibit "A" showed the overhead structure over Burkhart Alley between Lots 7 and 8 in Block 7 and you said it did not show the overhead part, the adjoining buildings overhead. How high is it from the sidewalk of Burkhart Alley to the bottom, the lowest point, of this overhead structure?

A. Well, really, I don't know,—I had no instructions to take notice of that and if I undertook to tell you it would be just making a guess.

(Testimony of W. A. Hesse.)

Q. What would be your judgment?

A. I suppose it is about 9 feet.

Witness excused. [56—17]

Testimony of A. E. Lathrop, in His Own Behalf (Recalled).

A. E. LATHROP, recalled.

Direct Examination (Continued).

(By Mr. DONOHOE.)

Q. Did you in the year 1908, the summer or fall of 1908, have any occasion from that time on, to pass through, over and upon Burkhart Alley as described in Plaintiffs' Exhibit "A"? A. Yes, sir.

Q. Do you know of any demands made by the city authorities to keep Burkhart Alley, as described in Plaintiff's Exhibit "A," free from obstruction, from the time it was laid out in the fall of 1908 up to the present time?

Mr. MEDLEY.—We object to that question; it is not the best evidence.

The COURT.—He is asked what he knows about it. He may answer—defendants allowed an exception.

A. I know as a councilman our chief had orders to keep the alley open and I know as a transfer man and I was instructed many times not to block the alley with freight, groceries, etc., when McDonald & Reedy had their store there and they wanted to keep the passageway open for hose carts in case of fire.

Q. Have you traveled over this Burkhart Alley to

(Testimony of A. E. Lathrop.)

any great extent from the year 1908? A. Yes, sir.

Q. Do you know of the defendant Slater in any manner obstructing this alley in the summer or fall of 1919? A. Yes, sir.

Q. What obstruction, if any, did Mr. Slater place upon the alley? A. Fence.

Q. How much of the Burkhart Alley did he fence in? A. His four feet.

Q. Describe what you mean by his four feet.

A. The four feet that was dedicated or used by the public—the four feet that he set his building back, or the original owners set [57—18] it back.

Q. You mean the four feet lying on the southerly side of the side line of Lot 7, Block 7?

A. Yes, sir.

Q. And did he after the commencement of this suit remove that obstruction? A. Yes, sir.

Q. Do you know of the defendant, the Bank of Alaska, placing any obstruction immediately thereafter in Burkhart Alley?

A. They placed a fence four feet on their side.

Q. On the northerly side of Lot 8? A. Yes, sir.

Q. That has since been removed also, has it?

A. Yes, sir.

Q. Do you know of the defendants announcing or threatening to close the portion of Burkhart Alley where it passes over Lots 7 and 8 in Block 7, that is, the portion of the alley between the buildings on Lot 7 and Lot 8? A. Yes, sir.

Q. And unless an injunction is granted against these defendants to restrain them from closing the

(Testimony of A. E. Lathrop.)

alley, do you know whether they intend to close that portion of the alley? A. Do I know?

Q. Yes. A. Yes.

Q. How many years during your residence in Cordova have you been a member of the Municipal Council? A. Three or four terms.

Q. A term covering one year? A. Yes.

Q. Do you know whether the owners of Lot 7 or Lot 8 in Block 7 [58—19] at any time objected to the public traveling upon this alley, previously?

A. No, sir.

Q. Was there ever any objection made to you by the owners of these two lots against your traveling on this alley as a public thoroughfare? A. No, sir.

Q. Did you ever hear of Robert Ashland or any other owner of Lot 7 in Block 7, making any objection to the public freely using this alley, prior to the time when Mr. Slater placed this obstruction thereon.

Mr. MEDLEY.—We object to the question as incompetent.

Objection overruled; defendants allowed an exception.

A. No, sir.

Q. Do you know of any owner of any building on Lot 8 in Block 7 ever making any objection to the public using Burkhart Alley freely as a public highway? Same objection; overruled; defendants allowed an exception. A. No.

Mr. DONOHUE.—That will be all at this time.

(Testimony of A. E. Lathrop.)

Cross-examination.

(By Mr. GRAHAM.)

Q. When the building now known as the Bank of Alaska, Cordova, was erected on Lot 8 in Block 7, which is on the south side of the so-called Burkhart Alley, the north wall of that building was set back 4 feet from the line between Lots 7 and 8, as I understand you? A. Yes.

Q. And that was only on the street level—that wall extended from [59—20] the street level up to the second floor of the building? A. Yes, sir.

Q. And then the second floor of the building extended northerly to the line between Lots 7 and 8?

A. Yes, sir.

Q. Now, the same condition existed with the construction of the building on Lot 7 in Block 7 just acrossed the so-called alley? A. Yes, sir.

Q. So that the two buildings joined at the property line between Lot 7 and Lot 8 from the second floor up? A. Yes, sir.

Q. Something like ten feet above the street walk?

A. Yes, sir.

Q. And that condition has existed ever since those two buildings were constructed, has it not?

A. Yes, sir.

Q. And from a point about ten feet above the street level, the whole of the area on Lots 7 and 8 in Block 7 has been occupied by the then owners of those lots respectively during all that time?

A. They rented it you mean?

Q. Yes. A. It was in their possession.

(Testimony of A. E. Lathrop.)

Q. And they were exercising dominion and control over it all that time? A. Yes, sir.

Q. That condition has existed ever since the Bank of Alaska building was constructed on Lot 8 in Block 7 and ever since the other building acrossed the so-called alley was constructed, which joins it with the other? [60—21] A. So far as I know, yes.

Q. And the respective owners of those two buildings have leased, rented and occupied all of that area during all of that time, with the exception of this hallway formed by the two buildings below the second floor?

A. I wouldn't say it has been leased, rented and occupied during all of that time—there was a period it was quiet.

Q. You don't know that it was not so occupied?

A. Yes, I do.

Q. There was a period— A. Yes, sir.

Q. That was a period when business was dull?

A. Yes.

Q. That was the only reason it was not occupied?

A. As far as I know the only reason.

Q. But it was in the possession and under the control of the owners of these respective lots during that period? A. Yes, sir.

The COURT.—I don't suppose there is any confusion but in the record you speak of area—it is really space instead of area; the record, however, fully discloses the situation.

Q. Now, take the building known as the Bank of Alaska, that had a sort of store building facing on

(Testimony of A. E. Lathrop.)

First Avenue, did it not? A. Yes, sir.

Q. And then back of the store building was some other space in the main building which was used by the owners of the building? A. Yes, sir.

Q. That space had an entrance on to this hallway or so-called alley? A. Yes, sir. [61—22]

Q. Now, the fact is the same condition obtained with reference to the building on this side?

A. Yes, sir. ,

Q. The building on the north side of the so-called alley, immediately north of the Bank of Alaska building, was occupied by Mr. Ashland for a period as a saloon? A. Yes, sir.

Q. A good share of the time you have testified to here, was it not—up until the territory went dry?

A. Oh, no.

Q. About how long?

A. Why, I don't think Ashland was in there over three years, to my knowledge—I don't think any more than that.

Q. When you speak of handling liquors, etc., in this alley—those liquors were taken into this building that lies on the north side, immediately adjacent to the so-called alley?

A. They were taken into both buildings; both buildings were occupied by saloons.

Q. So in handling liquors through that alley, you took them into the alley and then into the buildings now owned by the defendants in this case?

A. No, we did not; the Transfer Company delivered them in the alley.

(Testimony of A. E. Lathrop.)

Q. They were intended for those buildings and the occupants of those buildings?

A. Yes, sir, and the merchants took them in.

Q. And the stuff you had occasion to deliver there while you were in the business of transfer and delivery, and delivered through the alley from First Avenue, went to the owners or other tenants in these two buildings?

A. To the owners or the tenants; yes, sir.
[62—23]

Q. Now, then, First Avenue, on the westerly side of which your building is located, is intersected and crossed at the north end of the block in which your building is located by C Street, is it not? A. Yes, sir.

Q. And C Street extends from the city dock at the waterfront, easterly, over and acrossed First Avenue, intersects and crosses Second Avenue, Third, Fourth and Fifth, and runs on up the hill clear to the limit of the occupied settled portion of the town of Cordova, does it not?

A. Yes, sir.

Q. Now, upon the south end of the block in which your building is located another street called B Street runs from a point westerly of the lot on which your building is located, northerly, intersects and crosses First Avenue, continues easterly, intersects and crosses Second Avenue, Third Avenue, Fourth Avenue, etc., on to the easterly limit of the occupied and settled portion of the town of Cordova? A. Yes, sir.

(Testimony of A. E. Lathrop.)

Q. In fact, to the easterly limits of the platted town? A. Yes.

Q. Those two streets are graded streets, are they not?

A. I don't know whether they are graded—they are graded up to Fourth Street; this is only graded to Fifth or Sixth.

Q. It is graded to a point two or three blocks easterly of your building? A. Yes, sir.

Q. And sidewalks and foot travel on either side? A. Yes, sir.

Q. Those are regularly laid out dedicated streets? [63—24] Yes, sir.

Q. So that the public of the town of Cordova, people traveling over the town, desiring to go from one place to another in the town, have access to your building from all portions of the town by First Avenue and streets intersecting and crossing First Avenue on either end of the block in which your building is located? A. Yes, sir.

Q. People residing on Second Avenue between B Street and C Street in the town of Cordova have access to your building over public streets, B Street and C Street, do they not?

A. Oh, yes.

Q. The closing of the cross-walks which you mention as being something like 75 feet, I don't remember the distance, but the Clayson sidewalk which extended from opposite Clayson's store acrossed First Avenue between B and C Streets, was a privately built walk, was it not? A. Yes.

(Testimony of A. E. Lathrop.)

Q. And was not substantial or kept up?

A. Yes, it was—it was an excellent cross-walk.

Q. How about the so-called Boyle cross-walk, extending from opposite the Cordova drugstore?

A. That was privately built but not as good a cross-walk.

Q. About these lots—the complaint sets forth that you are the owner of Lots 23, 24 and 25 in Block 2 and I believe you testified you own 22, 23 and 24—

A. No.

Q. It is 24, 25 and 26? A. Yes, sir.

Q. There is no record title to Lots 25 and 26, is there? A. Not here; no. [64—25]

Q. Since the postoffice was moved to the westerly side of First Street, the travel on the westerly side of First Avenue has materially increased, has it not? A. Yes.

Q. And since your building was constructed and the tenants went into the use of it, that has increased the travel on the westerly side of First Street, has it not? A. Yes.

Q. Prior to the erection of your building, and prior to the location of the postoffice on the westerly side of First Street, there were few business enterprises on that side of the street?

A. Very few.

Q. So that the increase in the travel on the westerly side of First Street has been due very largely to the erection of your building and its occupancy and to the moving of the postoffice to the westerly side? A. Yes.

(Testimony of A. E. Lathrop.)

Q. How many apartments are there in this Burkhart Building?

A. I am not able to answer that, there are a great number, but very small.

Q. Have you any idea how many tenants there are?

A. I would say there are not less than 20 apartments.

Q. A great deal of the travel, a considerable portion of the travel, on this so-called Burkhart Alley during the past consisted of people going to and from places of business which were located on the alley? A. No.

Q. You spoke of a restaurant having been located on the alley? A. Yes, sir.

Q. There was more or less travel to that restaurant? [65—26] A. Yes, sir.

Q. Practically all the travel to and from that restaurant was on that alley?

A. That was the only way they could reach the restaurant.

Q. The people in the Burkhart Flats, these tenants, used the alley more or less, did they not?

A. Yes.

Q. And people having occasion to go to the saloon or to take supplies to the saloon, etc., either saloon, on either side of the alley, the time the saloons were maintained there, used the alley for that purpose? A. Yes.

Q. In other words, the alley was used during practically all this time by the owners of the build-

(Testimony of A. E. Lathrop.)

ings for their private use, in addition to what public travel there was through there?

A. Yes, sir.

Q. A sort of joint use, then? A. Yes, sir.

Q. Partly private and partly public—is that the case?

A. I don't know how you could call it private.

Q. A good portion of the people who used the alley used it to do business with the businesses that were located on the alley and a part of the people simply used the alley to go back and forth—some wanted to go clear through and some part way—is that the case?

A. The private use of the alley in Ashland's case was when his family lived upstairs; the balance of it was public.

Q. In Ashland's case—what building was that?

A. That was the building on the north side of the alley.

Q. And used also in taking his stock of liquor, etc., into the back portion of his saloon? [66—27]

A. Yes, sir.

Q. And on the other side, what did the private use consist of?

A. Burkhart had a waffle-house on the other side.

Q. That is in the building now known as the Bank of Alaska Building? A. Yes, sir.

Q. And the travel to that portion was to and from that business? A. Yes, sir.

Q. And over the building on the north side of the alley where you say Ashland's saloon was—that was

(Testimony of A. E. Lathrop.)

on the north side? A. Yes.

Q. For a good portion of this time the upper portion of that building was used for roomers and lodgers—apartments? A. Yes, sir.

Q. And the entrance to that was through the alley? A. Yes, sir.

Q. So people had to use the alley to reach those apartments? A. No, they didn't have to use it.

Q. But they did?

A. They could have gone around—the door leading upstairs over the Ashland property is right on the end of the building, so you could go in there from the side alley.

Q. They could have gone around and used the side alley to go in there or taken the shorter cut and used the so-called Burkhart alley? A. Yes.

Q. And gone under the portion of the building which was over the alley and been indoors, practically? A. Yes, sir.

Q. It was practically an indoor walk through there? A. Yes, sir.

Q. Protected from storm? [67—28] A. Yes.

Q. And no snow in there? A. No.

Q. The construction of the building over it practically enclosed it? A. Yes, sir.

Q. Captain Lathrop, in your estimate of the amount of travel that went through this Burkhart Alley, you didn't take into consideration the number of teams and autos and travel on B Street and C Street, that kind of travel—there is no travel of that kind through the alley? A. No.

(Testimony of A. E. Lathrop.)

Q. In this estimate of yours on the amount of travel that went through the alley as compared with the amount on B Street and C Street—that all occurred long before there was any controversy over the alley, before constructing your building; that is what you are speaking of now when you say there was something like 80% of the travel—and when the postoffice was in the Ostrander Building—went through the so-called alley?

A. I base my estimate on the travel through the alley during the period the postoffice was on Second Avenue.

Q. And that was before you constructed your building?

A. Yes, sir; that was before I constructed my building.

Q. And before you had any reason to observe closely the amount of travel through the alley as compared with the others? A. No.

Q. You had no occasion to observe it?

A. Yes, I couldn't help to take notice of it.

Q. You noticed it before—you had business reasons for noticing it? You never made a census of the travel, never checked it up and counted the number of vehicles and teams and persons that used B and C Streets—did you ever do that? [68—29]

A. Why, no.

Q. And you never counted the number of persons that went through Burkhart Alley in any given length of time? A. No, sir.

Q. You never counted the number of persons that

(Testimony of A. E. Lathrop.)

walked on B Street and C Street? A. No, sir.

Q. Your estimate, then, is purely a guess, as you would simply make an estimate of it now, some years after the situation has changed.

A. Well, I am not quoting that from actual count.

Q. I thought my question was rather fair. I would like to have you answer it—it is really an estimate made after a year or two, since the conditions have changed which affected that travel?

A. No.

Q. When did you first make this estimate?

The COURT.—You have asked him about an estimate and about a guess—the first question was whether or not this was not just a guess and now you ask whether it is an estimate.

Mr. GRAHAM.—I will withdraw the question about the guess and eliminate that.

Q. When did you first make this estimate of the amount of travel that you give us now—that you gave a little while ago?

A. I made it right here.

Q. Is that the first time you have estimated in your mind the amount of travel in this alley as compared with B Street and C Street, during the time the postoffice was in the Ostrander Building?

A. It is not.

Q. When was the first time?

A. When I was on the Council a question came up regarding the upkeep [69—30] and lights, etc., and about the travel through the alley and on

(Testimony of A. E. Lathrop.)

the streets; that question came up.

Q. How long ago was it that the postoffice was moved from the Ostrander Building?

A. During the "flu" time, this last winter.

Q. About a year ago?

A. Just about a year ago.

Mr. GRAHAM.—That's all.

(By Mr. DONOHOE.)

Q. Counsel for the defendants has asked you about the travel through Burkhart Alley, and he asked you the question, was the alley not used jointly by the occupants of buildings along the alley, as well as by the public, and I think you answered him "Yes?" I will ask you now if the use of Burkhart Alley, whether privately or publicly, was not the same as the use of the sidewalks on any of the streets in the town of Cordova?

A. Just the same.

Q. Burkhart Alley was not a way where you could take teams or autos or trucks through?

A. No, sir.

Q. It was used solely for foot-passengers, foot travel? A. Yes.

Q. You said you made an estimate as to the extent to which Burkhart Alley was used by the public when you were on the Council and the reason for that was there was a request for some light, for the city to put in lights in the alley—

Mr. GRAHAM.—We object to that.

Mr. DONOHOE.—I will withdraw that question. [70—31]

(Testimony of A. E. Lathrop.)

Q. Do you recall at any time during the years you were a member of the Council when a question came up before the Council of lighting Burkhart Alley, furnishing lights? A. Yes, sir.

Q. State what was done in that connection by the City Council.

Mr. GRAHAM.—We object unless he shows when this occurred, what date, etc., and I think the records of the City Council are the best evidence anyway.

Mr. DONOHUE.—I will withdraw the question at this time. We will take that up later. That is all, Mr. Lathrop.

Witness excused. [71—32]

Testimony of Alice Johnson, in Her Own Behalf.

ALICE JOHNSON, one of the plaintiffs, called and sworn in her own behalf, testified as follows:

Direct Examination.

(By Mr. DONOHUE.)

Q. What is your name? A. Alice Johnson.

Q. Where do you reside?

A. In the Burkhart Apartments.

Q. Town of Cordova, Alaska? A. Yes, sir.

Q. You are one of the plaintiffs in this action?

A. Yes, sir.

Q. When did you first live in Cordova?

A. I came to Cordova in 1910—May 16th.

Q. Have you lived here a good portion of the time ever since? A. About half of that time.

(Testimony of Alice Johnson.)

Q. After you were here for a while you went into the Interior? A. Yes, Chitina.

Q. And when did you return to live in Cordova permanently? A. 1916.

Q. Are you the owner of Lot 25 in Block 7 of the town of Cordova or have you a contract for the purchase of that lot? A. Yes, sir.

Q. You have such a contract? A. Yes, sir.

Q. I hand you a paper and ask you if that is the contract which you have for the purchase of Lot 25, Block 7? A. Yes, sir.

Mr. DONOHUE.—We offer this in evidence.

(The contract is admitted in evidence, without objection; is marked Plaintiffs' Exhibit "B," and copy is attached hereto and [72—33] made a part hereof.)

Q. When did you enter into this contract to purchase for Lot 25 in Block 7 as set forth in Plaintiffs' Exhibit "B," in this paper, this contract?

A. July 6, 1918.

Q. What is the purchase price for this lot?

A. \$5,000.

Q. How much did you pay down on the signing of this? A. One thousand dollars.

Q. And did the contract provide for \$100 monthly payments? A. Yes, sir.

Q. And how many of those payments have you made? A. Seventeen, I think it is.

Q. That makes a total payment on this property, on the purchase price, of \$2,700? A. Yes, sir.

(Testimony of Alice Johnson.)

Q. Have you paid all the monthly payments required by the contract to purchase?

A. Yes, sir.

Q. And you have been in possession of the property since some time in July, 1918?

A. Yes, sir.

Q. Are you renting the various apartments you have in that building? A. Yes, sir.

Q. Were you familiar with Burkhart Alley when you were residing in Cordova in 1910?

A. Yes, sir.

Q. Did you pass over it from time to time?

A. Yes, sir.

Q. When you returned to Cordova in 1916, and before you entered into [73—34] this contract to purchase Lot 25, did you have occasion to observe Burkhart Alley? A. Yes, sir.

Q. And the amount of travel that passed through it?

A. I never closely observed the amount of travel, but I always used it in preference to any other street.

Q. Did you use it freely and without any permission from anyone? A. Yes, sir.

Q. Now, when you started to negotiate for the purchase of this Lot 25—did you have knowledge at that time that the Burkhart Alley had been used at least since 1910 generally by the public?

A. Yes, sir.

Q. Was the fact that Burkhart Alley was laid out and being used generally by the public one of

(Testimony of Alice Johnson.)

the inducements that induced you to buy that property for \$5,000?

Mr. GRAHAM.—We object to that as not within the pleadings in the case. There is no pleading of estoppel and it is immaterial and irrelevant, and on the further ground that the contract introduced in evidence is a contract for the conveyance to her of the entire lot to the center of the alley; there is no reservation in the contract of any portion of the lot.

Objection overruled; defendants allowed an exception to the ruling.

A. Yes, sir.

Q. Miss Johnson, how many apartments have you in your building on Lot 25? A. Twelve.

Q. And what is the nature of the building—what is the dimensions and size of the building, about, approximately?

A. I would say about 22 by 100.

Q. And how many stories in it, how many floors? [74—35] A. Two and the basement.

Q. You rent those twelve apartments to people, to residents? A. Yes, sir.

Q. And in the basement of the building have you a laundry?

A. Yes, sir; a laundry and bathroom.

Q. Did you at any time as the owner of Lot 25, Block 7, consent to the closing of Burkhart Alley?

A. No, sir.

Q. Now, what, in your opinion, would be the damage done you by the reduced value of your

(Testimony of Alice Johnson.)

property, Lot 25, Block 7, and also the reduced revenue that you could obtain from Lot 25 if the westerly part of Burkhart Alley was closed, and by the westerly part, I mean that portion of the alley running between the Alaska Bank and the Northern Drugstore, at this time?

A. Well, I would say at the very lowest it would be 25%, if not 50%.

Q. Where is the principal business street of the town of Cordova? A. First Street.

Q. If you or your tenants have business on First Street, how do you travel to get to First Street, from your building?

A. Through the Burkhart Alley.

Q. Now, if the westerly portion of Burkhart Alley was closed, how would you then proceed to get to First Street, if you had business there?

A. Well, we would have to go through the city alley or go up around Second Street. up around the next street.

Q. You mean the city alley running north and south running north and south through Block 7?

A. Yes.

Mr. DONOHOE.—That's all. [75—36]

Cross-examination.

(By Mr. GRAHAM.)

Q. Is it Miss or Mrs. Johnson?

A. Miss Johnson.

Q. This lot you speak of for which you have the contract to purchase fronts on Second Avenue?

A. Yes, sir.

(Testimony of Alice Johnson.)

Q. And Second Avenue connects with B Street and C Street on either side? A. Yes.

Q. So you have an open public highway, made an open public highway, from the alley around on either B or C Street to First Avenue, the principal portion of the town?

A. Yes, from Second Street.

Q. Your property also abuts on the public alley which runs north and south through Block 7?

A. Yes, sir.

Q. So you have access to the rear portion of your premises from this alley that runs north and south?

A. Yes, sir.

Q. What is the number of the lot this building is on, that you have a contract to purchase?

A. I think it is 25.

Q. A portion of that building extends nearly to the line between the two lots, does it not, the centre of the alley? A. I didn't get that.

Q. A portion of the building you are occupying extends nearly to the centre, between your lot and the next lot, north of the lot you occupy?

A. Yes, sir.

Q. There isn't a four-foot strip left open there?
[76—37] A. No.

Q. On your side? A. No.

Q. It is only about 18 inches? A. Two feet.

Q. About two feet? A. Yes, sir.

Q. Isn't that little walk that leads from Second Avenue back along the north side of the building you occupy something over 2 feet wide?

(Testimony of Alice Johnson.)

A. Just 2 feet wide.

Q. So that you are now occupying at least two feet of the southerly portion of this so-called Burkhart Alley with your building?

A. Well, I am occupying a part of the four feet.

Q. In other words, you are occupying one-half of the south half of the so-called Burkhart Alley?

A. Yes, sir.

Q. And you have for some time?

A. It was that way when I purchased it.

The COURT.—You speak of a building and speak of a walk. Is it the contention that that is a part of the building itself, that two feet of that is over on the 8 ft. strip or is it the walk you speak of?

Mr. MEDLEY.—This is a high walk and it is part of the building, like a piazza.

Q. This two feet walk you speak of doesn't run on the same level as the sidewalk in this so-called alley?

A. No, it is connected with the building.

Q. And about the same height as Second Avenue there? A. Yes, sir.

Q. So the public traveling from Second Avenue to First Avenue, if [77—38] they wanted to use this Burkhart Alley, couldn't use that southerly two feet of the alley? A. No.

Q. How long did you say you had been about Cordova? A. I came here in 1910.

Q. That was the first time you were here?

A. Yes.

(Testimony of Alice Johnson.)

Q. How long did you live here then?

A. Until September, 1910.

Q. What month did you come here in 1910?

A. In May.

Q. You lived here from May until September, 1910? A. Yes.

Q. Then where did you go? A. Chitina.

Q. When did you return to Cordova to live after that? A. 1916.

Q. What month did you return in 1916?

A. I really don't remember.

Q. Was it the early part or the latter part?

A. I think it was the latter part of 1916, about August.

Q. Then from the time you left Cordova and went to Chitina and came back here you were not familiar with the use of that alley by anybody?

A. Well, I passed through here quite often and was here on a visit quite often.

Q. When you were here on visits, did you go through that alley? A. Yes, sir.

Q. And you went through the alley you say when you lived here in 1910? A. Yes. [78—39]

Q. When you went through that alley you passed through a hallway, did you not, in getting to First Avenue?

A. I noticed the alley all the way through—I didn't notice there was a hallway.

Q. You didn't notice there was a hallway through there, but it was roofed over above you?

A. Yes, I noticed it was roofed over, of course.

(Testimony of Alice Johnson.)

Q. You noticed when you went on that alley and started to go through it, that you were going along a building? A. Yes, sir.

Q. And that it was walled up on both sides?

A. Yes, sir.

Q. Pretty close? A. Yes, sir.

Q. And the snow couldn't fall in there?

A. Yes, sir.

Q. Roofed over so it couldn't get in? A. Yes.

Q. You noticed above the walk was a continuation of buildings, above the premises occupied there?

A. To tell the truth, I didn't notice that.

Q. You never looked up at all? A. No.

Q. But you did notice it was occupied or noticed it was built over? A. I never noticed that.

Q. Have you lived here continuously since you returned here in 1916? A. Yes, sir.

Q. You went through that alley a good many times prior to that time? A. Yes, sir.

Q. Now, I would like to have the witness state, so I may understand it and that the record may show, whether during the numerous times [79—40] she went through that alley, she noticed there was some obstruction overhead, that it was roofed over?

A. As I said before, I never paid any attention to the overhead; I never noticed it.

Q. You never noticed it was roofed over in any manner? A. No, sir.

Q. And you say you have been through it a great many times? A. Yes, sir.

(Testimony of Alice Johnson.)

Q. You testified a while ago that the snow never fell there?

A. I never walked in snow there.

Q. How do you know the snow hadn't fallen there? A. I never saw it on the ground.

Q. What did you think prevented the snow coming in there?

A. I had an idea it was an overhead covering, but I never noticed it.

Q. But you really believed there was such a covering there? A. Yes, sir.

Q. But didn't take the trouble to glance up and see just what it was? A. No, sir.

Q. It may have been any sort of overhead covering as far as you can tell?

A. I was just going through—it was convenient for me.

Q. In your contract for the purchase of Lot 25 in Block 7, the contract reads, giving a description of the property, being Lot 25 in Block Number 7, according to the map and plat thereof, recorded in the office of the recorder of the Cordova Recording District of Alaska, in Book of Deeds Number—giving the book and page number, etc., and your contract calls for the conveyance of the lot clear to the centre of this so-called alley, does it not? [80—41]

A. Well, I don't know.

Mr. DONOHUE.—The contract calls for the full lot.

Mr. GRAHAM.—That's all.

(By Mr. DONOHUE.)

Q. In reference to your building on Lot Number

(Testimony of Alice Johnson.)

25, I will ask you if the north wall of your building, the building proper, is four feet from the north line of Lot 25? A. The building is four feet; yes, sir.

Q. And there is a walk two feet wide, you say?

A. Yes, sir.

Q. Running from the Second Street level?

A. Yes.

Q. And then there is another walk two feet wide starting from a point on Burkhart Alley running along the buildings to the rear?

A. Both of these walks are the public thoroughfare.

Q. One starts from the grade of Burkhart Alley going towards the west? A. Yes, sir.

Q. Is that condition now the same as it was when you first observed it in 1910 or when you did observe it? A. Yes, sir.

Q. There has been no change in the walk since you first observed it? A. No, sir.

Q. Or in the building? A. No, sir.

Q. And there has been no encroachments made upon Burkhart Alley by any structure you have in your building since you first observed the manner and the width of Burkhart Alley at that point? [81—42] A. No, sir.

(Questions by the COURT.)

Q. Now, Miss Johnson, as I understand it and as you understand it probably, from walking through there many times, this alley which runs along the side of your lot is on a kind of slope or incline?

A. Yes, sir.

(Testimony of Alice Johnson.)

Q. What is the purpose of these walks which you have spoken of that are built out in the alley?

A. They are entrances to the apartments.

Q. In other words, it would be presumed that the floors in your house are level? A. Yes, sir.

Q. And these walks, as I understand it, are for the purpose of getting into the building?

A. Yes, sir.

Q. Is that the sole use it is put to?

A. Yes, sir.

Q. The building itself, that is, speaking of the building and not the walks, is how far back from the line?

A. Well, it is two feet back; the building itself besides the walk is four feet back—the wall of the building is four feet back.

(By Mr. DONOHOE.)

Q. Now, Miss Johnson, on the Second Street end of your lot, what is the small building there occupied with? A. It is a tailor-shop.

Q. That is separate from your apartment building? A. Yes, sir.

Q. And to get to the entrance to the lower floor of your apartment you must enter the alley some distance before you can get to this narrow 2-foot walk along the side of your building? A. Yes, sir.

Q. And there are two feet of your lot that is in the Burkhart Alley proper? A. Yes, sir.

Witness excused.

Recess to 2 P. M. [82—43]

Thursday, December 11, 1919.

AFTERNOON SESSION.

Testimony of K. G. Robinson, for Plaintiffs.

K. G. ROBINSON, a witness called and sworn in behalf of the plaintiffs, testified as follows:

Direct Examination.

(By Mr. DONOHUE.)

Q. State your name and residence.

A. K. G. Robinson; Cordova.

Q. How long have you resided in Cordova?

A. Since 1911.

Q. What official position do you hold in the town of Cordova at this time?

A. City Clerk and Municipal Magistrate.

Q. As City Clerk are you the custodian of the minute-books of the Common Council of the town of Cordova? A. I am.

Q. Have you Volume One of the minute-books of the proceedings of the Common Council of the town of Cordova? A. I have.

Q. Will you please turn to page 219, under date of June 3, 1912—is there a record there of the proceedings of the Common Council of the town of Cordova? A. Yes, sir.

Q. What meeting is that you have recorded there? Minutes of what meeting?

A. Minutes of the meeting of the Common Council of the town of Cordova held at the town hall, at 8 o'clock P. M. June 3, 1912.

Q. Read from page 219 any reference that is

(Testimony of K. G. Robinson.)

made there in the minutes in regard to Burkhart Alley in the town of Cordova?

Mr. GRAHAM.—We object to that unless it is shown that these defendants were present or represented at that meeting.

Mr. DONOHOE.—The purpose of the testimony is to show acts of ownership [83—44] exercised over this alley by the Town Council. I was about to attempt to show it this morning by a member of the Common Council and it was objected that the minutes were the best evidence.

Mr. GRAHAM.—The minutes would be the best evidence of what took place providing it was binding on these defendants, but any action taken, not brought home to these defendants, which caused these defendants to do something with reference to that property, would have no binding effect whatever upon the defendants in this case.

The objection was by the Court overruled; to which ruling of the Court counsel for defendants is allowed an exception.

A. (Witness reading:) The Committee on Fire Protection reported that the Cordova Power Company would put in a hydrant on First Street at Burkhart Alley if the town would pay the actual cost of cutting the main and other work except the cost of the hydrant. The matter was postponed until the next meeting of the Council.

Mr. GRAHAM.—Defendants move to strike the answer of the witness on the ground that it is irrelevant and immaterial.

(Testimony of K. G. Robinson.)

Which motion was by the Court denied and defendants allowed an exception to the ruling.

Q. Now, turn to page 220, under date of June 17, 1912, and read any action of the Common Council that is there reported in regard to Burkhart Alley.

Mr. GRAHAM.—We make the same objection.

Objection overruled; defendants allowed an exception.

A. (Witness reading:) The Chief of police was directed to notify owners to repair walk in Burkhart Alley.

Mr. GRAHAM.—The defendants move to strike the answer, on the same grounds. [84—45]

Motion denied; defendants allowed an exception.

Q. Turn to page 234, under date of October 21, 1912, and read any record that appears there of actions taken by the Common Council of the town of Cordova in reference to Burkhart Alley.

Mr. GRAHAM.—Same objection.

Objection overruled; defendants allowed an exception.

A. (Witness reading:) Notice was given that a street light was wanted in the alley at the intersection of Burkhart Way and at various other points. The matter was referred to the Committee on Light with authority to use their own judgment in ordering new lights.

Mr. GRAHAM.—We move to strike the answer on the ground that it is incompetent, irrelevant and immaterial.

(Testimony of K. G. Robinson.)

Motion denied; defendants allowed an exception.

Q. Now, turn to page 321, under date of May 18, 1914, and read any record there in reference to Burkhart Alley.

Mr. GRAHAM.—We object to the question on the ground that it is incompetent, irrelevant and immaterial.

Objection overruled; defendants allowed an exception.

A. (Witness reading:) The Fire Committee recommended that a fire hydrant be placed at each end of the Burkhart Alley in the middle of Block 7, and the chief of the fire department be also made fire warden.

Mr. GRAHAM.—We move *the* strike the answer on the ground that it is incompetent, irrelevant and immaterial and is not binding on the defendants.

Motion denied; defendants allowed an exception.

Q. Turn to page 323 under date of May 18, 1914, and read the record there with reference to Burkhart Alley.

Mr. GRAHAM.—We make the same objection.
[85—46]

Objection overruled; defendants allowed an exception.

A. (Witness reading:) Mr. H. I. O'Neill addressed the Council calling attention to the necessity of a light at the Burkhart Alley on Second Street and suggested that the lamp-post a short distance north be removed to that point, and also that a rail-

(Testimony of K. G. Robinson.)

ing be placed— That is as far as it goes on that subject.

Mr. GRAHAM.—We move to strike on the same grounds.

Motion denied; defendants allowed an exception.

Q. Turn to page 332, under date of June 6, 1914, and read any record there with reference to Burkhart Alley.

Mr. GRAHAM.—Same objection.

Objection overruled; defendants allowed an exception.

A. (Witness reading:) It was moved and seconded that the placing of hydrants on First and Second Streets opposite Burkhart Alley be referred to the Fire Committee with power to act. The motion prevailed.

Mr. GRAHAM.—We move to strike the answer on the same grounds.

Motion denied; defendants allowed an exception.

Q. Turn to page 348, under date of September 14, 1914, and read any record there with reference to Burkhart Alley?

Mr. GRAHAM.—We make the same objection, and wish to have it apply to all these questions.

Objection overruled; defendants allowed an exception.

A. (Witness reading:) The matter of placing hydrants at each end of Burkhart Lane was discussed. Mr. Hazelet stated that the hydrants had been ordered and would be placed as soon as they arrived.

(Testimony of K. G. Robinson.)

Mr. GRAHAM.—I should also like to have it understood that the defendants move to strike the answer in each case, that the motion is denied and defendants allowed an exception.

By the COURT.—Very well. [86—47]

Q. Now, turn to page 357, under date of October 19, 1914, and read what you find there with reference to Burkhart Alley.

A. (Witness reading:) The Committee on Light and Water reported that hydrants had been placed on First and Second Avenues opposite the Burkhart Alley.

Q. Next, turn to page 437, under date of November 6, 1916, and read any record there with reference to Burkhart Alley.

A. (Witness reading:) It was reported that Burkhart Alley was in bad condition and it was decided that the owners should be notified to have it repaired.

Mr. DONOHOE.—That is all.

Mr. GRAHAM.—No cross-examination.

Witness excused. [87—48]

Testimony of George Dooley, for Plaintiffs.

GEORGE DOOLEY, a witness called and sworn in behalf of the plaintiffs, testified as follows:

Direct Examination.

(By Mr. DONOHOE.)

Q. What is your name and residence?

A. George Dooley; Cordova, Alaska.

(Testimony of George Dooley.)

Q. How long have you resided in the town of Cordova, Alaska?

A. Since November 19, 1907.

Q. Have you held any official positions in the town of Cordova during your residence here?

A. I have.

Q. What official positions did you hold in the town of Cordova from the time of the organization of the town, which was in 1909, until some time in 1910?

A. Chief of the fire department and chief of police.

Q. During 1910, 1911 and up to April, 1912, what position did you hold?

A. The same position.

Q. Did you again occupy an official position in the town of Cordova, later on? A. I did.

Q. During the years 1915 and 1916 and until November, 1917, what official position did you occupy?

A. Chief of police and chief of the fire department.

Q. As chief of police was it part of your duties and as chief of the fire department to follow out instructions given you by the Common Council for various purposes? A. It was.

Q. Are you familiar with the alley, from First to Second Streets in the town of Cordova, occupying four feet on the east side of the dividing side lines between Lots 7 and 8 and between Lots 25 [88—49] and 26, Block 7, in the town of Cordova, known as Burkhardt Alley? A. I am.

(Testimony of George Dooley.)

Q. When was Burkhart Alley first opened up, laid out?

Mr. GRAHAM.—We object to that question; it has not been shown it was laid out.

The COURT.—I take it the part of the question “opened up” was intended to take the place of the words “laid out.”

Mr. DONOHOE.—That is the idea—I didn’t mean to say it was officially laid out.

The COURT.—Answer the question.

A. In 1908.

Q. Were you in the town of Cordova in 1908 when Robert Ashland constructed a building on Lot 7 in Block 7 of the town of Cordova, which is the building that now occupies that lot?

A. I was.

Q. Will you describe how far the south wall of that building was erected from the south line of Lot 7?

The COURT.—It is admitted that it was four feet.

Mr. GRAHAM.—The lower story; yes.

A. I would say about four or five feet—I have never measured it; I judge it is eight or ten feet wide there.

Q. Were you in the town of Cordova when the building was erected by Mr. Burkhart on Lot 8, Block 7? A. Yes, I was.

Q. After those buildings were erected, the one on Lot 7 and the one on Lot 8, was there any space, ground, left between those buildings?

(Testimony of George Dooley.)

A. There was an alleyway between the two buildings; yes, sir.

Q. About what is the width of that alley?

A. I should judge between eight and nine feet, possibly eight feet—I [89—50] have never measured it exactly.

Q. Were you in the town of Cordova when Mr. M. Finklestein erected his building on Lot 26 in Block 7 of the town of Cordova; that is, the lot now known as the Carsten lot?

A. I wasn't exactly in the town; I was deputy marshal at that time and resided in the old town and was in town every day.

Q. You were familiar with how that building was erected in reference to the south line of the lot?

A. Yes.

Q. And was there the same space of about four feet left along the south side of Lot 26 when Mr. Finklestein erected his building? A. There was.

Q. Were you in the town of Cordova when Mr. Burkhart erected his building on Lot 25, Block 7?

A. That is the apartment?

Q. Yes. A. I was.

Q. Do you know what space was left along the northerly side of Lot 25 in Block 7 when that building was erected?

A. That is the building on Second Avenue?

Q. That is the lot on Second Avenue, the building, on which the Burkhart Apartments are situated? A. Yes, sir.

(Testimony of George Dooley.)

Q. Describe to the Court the situation along there.

A. The grade on Second Avenue is higher than that on First; there is a runway down that, quite a walk; I should judge it is 6 feet wide, from the Carsten or Finklestein building; it runs down on an incline say twenty or thirty feet to a point possibly six or seven feet below the grade of Second Avenue. Then there is a walk or platform that runs along the apartments which serves [90—51] as an approach or entrance to the apartments, on the first floor of the apartments. On the second floor there is a platform three or four feet wide joining the tailor-shop that runs back and raises possibly two feet and reaches another approach which runs back and serves as an entrance or approach to the apartments, on the second floor of the Burkhart apartments.

Q. Do you know approximately what the width of this approach, of these approaches, are?

A. I would say the approaches are between two and three feet, possibly $2\frac{1}{2}$.

Q. Then was there any other portion of Lot 25 left along the grade of the alley—in other words, was the wall of the building set back four feet from the north side line?

A. Yes, it was set back three or four feet.

Q. And you say two or $2\frac{1}{2}$ feet of that space was occupied by approaches?

A. Yes, sir, overhead, the first floor runs down from the level which I have described, it runs level

(Testimony of George Dooley.)

to that first floor and when it reaches the alley, it is above the alley and floor space is left right at the alley.

Q. What can you say as to when, if at all, this alley commenced to be used by the traveling public of Cordova?

A. I would say it was used in 1908—the exact time I wouldn't say. Burkhart first established a small bakery in the rear of the lot, off of First Avenue, and it started to be a thoroughfare at that time. I couldn't say without looking up some records just when that was used but it was 1908.

Q. It was some time during the year 1908?

A. It was some time during the year 1908. [91—52]

Q. What would you say as to the amount of travel that passed through that alley in reference to the amount of travel that passed along either B or C Street, in traveling from First to Second or from Second to First Street, foot travel?

A. The only observation I can make is that there was more travel through Burkhart Alley than there was on B or C Street.

Q. Burkhart Alley was never used for anything but for people walking or foot-passengers; in other words, it was not used for teams?

A. No, foot-passengers.

Q. Have you, at a recent date, within the past two or three months, been through Burkhart Alley and observed its condition, generally?

A. I have been there several times; yes, sir.

(Testimony of George Dooley.)

Q. Is the space or room for travel to be utilized the same now as it was when the alley was first opened up in the fall of 1908?

A. It is the same now.

Q. Are the approaches you have described along the building on Lot 25 the same as they were when the alley was first opened up?

A. They are, with the possible exception at one time there was an approach or viaduct from this approach I have mentioned over to the Finklestein building on the other side.

Q. Overhead.

A. Overhead—that was years ago. They used to enter the first floor of the Finklestein building in the rear, from the first floor of the Burkhart apartments. That was in 1909, I believe; with that exception the Burkhart alley is the same as when first erected.

Q. The overhead passage between the Finklestein building and the Burkhart apartments has since been taken down? A. Yes, sir.

Q. That overhead passage didn't in any way interfere with people [92—53] traveling on the grade up and down the alley? A. No.

Q. How high would you say it was from the floor of the alley?

A. Between 12 and 15 feet some place.

Q. Now, calling your attention to the buildings on Lots 7 and 8, the upper story, the second story of those buildings extends out over the alleyway and join, do they not? A. They do.

(Testimony of George Dooley.)

Q. What is the height would you say between the floor of the alley and the roof formed overhead by the extending out of the second story of each of these buildings?

A. I would judge about ten feet, possibly 11.

Q. Does it give ample room for using the alleyway conveniently for foot travel?

A. Yes, sir, it does.

Q. It in no way interferes with people using the alleyway who travel on foot? A. No.

Q. Do you know of Mr. Slater, one of the defendants here, placing any obstruction in Burkhart Alley, some time in September of this year, or August of this year?

A. I saw a fence there some time ago.

Mr. MEDLEY.—We admit the obstruction.

Q. From the time this alleyway was opened up in 1908 until this obstruction was placed in the alleyway by Mr. Slater, did you ever observe any obstruction, permanent obstruction, in the alley, that in any way interfered with its being used as a public highway?

A. That is the only one, with the exception of the fence moved acrossed on Lot 7, close to the bank; there was an obstruction placed there. [93—54]

Q. That was after?

A. That was after. That was the only permanent obstruction I have known in the alley.

Q. Have you yourself used that alley and passed through and over it and upon it various and many times since it was opened up in the fall of 1908?

(Testimony of George Dooley.)

A. I have used it quite frequently.

Q. Did anyone at any time forbid you to use it or attempt to stop your free use of it as a public thoroughfare? A. No, sir.

Q. Did you ever hear of anybody being requested not to use that alley as a public thoroughfare? A. I have not.

Q. Did you ever ask permission from anyone to use this alleyway? A. I did not.

Q. Now, what can you say as to the continued use of this alley by the public of the town of Cordova since the time it was first opened up in 1908?

A. I would say that it has been used as a continuous highway from that date until the obstructions have been placed there—when left open has been used continuously since 1908.

Mr. GRAHAM.—We move to strike the answer as a conclusion, using the word “highway.”

The COURT.—He said used as a highway—the answer doesn’t necessarily mean a public highway. Objection overruled and motion denied.

Defendants allowed an exception to the ruling.

Q. Do you know of the municipality of Cordova placing any lights or maintaining any light in the Burkhart Alley for the purpose of lighting it, like the lights on the other streets of the town?

A. I will state that the city maintained a light in the rear of the passageway, on the alley end of the passageway. That it [94—55] was my duty as a city officer to turn on and off, morning

(Testimony of George Dooley.)

and night, during my position as chief of the fire department, from 1915 to November, 1917.

Q. And from 1915 to November, 1917, you know of your own knowledge that the city maintained the light in the rear end of the passage extending from First Avenue back to the regular alley running north and south? A. Yes, sir.

Q. And was it your duty to turn that light on in the evenings and turn it off in the mornings?

A. It was.

Q. And do you know whether the city paid for that light, to the Light Company?

A. I understood it did—I enumerated it with the other city lights.

Mr. GRAHAM.—We move to strike what he understood.

Motion granted.

Q. Do you know anything of moving a street light on Second Avenue so it would be opposite the alley?

Mr. GRAHAM.—We object for the reason that anything the city did with the streets which was not in the alley could not be prevented or objected to by any of these property owners and is not binding upon the property owners in any manner, shape or form.

Objection overruled; defendants allowed an exception.

A. Yes, I remember of the city moving a light that a member of the council had placed a few

(Testimony of George Dooley.)

feet further north to a point opposite Burkhart Alley.

Q. What was the purpose of moving that light from its original location?

Mr. GRAHAM.—I object to that as incompetent, irrelevant and immaterial. [95—56] I don't think the witness is competent to testify.

Objection overruled; defendants allowed an exception.

A. The light was placed there to light the passageway between the Burkhart Alley.

Q. That light you have just testified to was a street lamp-post, was it? A. Yes, sir, it was.

Q. And it had formerly been placed how far north of the place where it was moved to, about, approximately?

A. About fifty feet, I should judge.

Q. Do you recall at this time, any time, during the time you occupied the position of chief of police in the town of Cordova, of notifying the property owners, whose property abutted on each side of the Burkhart Alley to make repairs of their sidewalks, and in so doing were you following the instructions given you by the City Council?

A. On one occasion the council notified me to notify Mr. Burkhart that his sidewalk in front of the tailor-shop on Second Avenue sloped too much toward the street and told me to tell him to raise it.

Q. That was the sidewalk along Second Avenue?

(Testimony of George Dooley.)

A. Yes; and on another occasion I was notified to notify the owners to repair the walk in the passageway between Lots 7 and 8.

Mr. GRAHAM.—We move to strike that answer on the ground that it is incompetent, irrelevant and immaterial.

Motion denied; defendants allowed an exception to the ruling.

Q. That is the Burkhart Alley that passes over Lots 7 and 8? A. Yes, sir.

Q. Did you while chief of police ever cause the snow to be shoveled out of Burkhart Alley?

A. I did. [96—57]

Q. Just how often, would you say, you did that, during each winter, while you were chief of police?

A. Three or four times; I couldn't say exactly; sometimes Mr. Burkhart would do it and other times I would go by with a crew of men which I used to employ on these occasions and it was cheaper for him he said to have the crew and have me do it, and on one occasion I think he was out and I sent the crew down there and cleared out a passageway down in the alley.

Q. That was the same as you cleaned out the other streets of the town where the accumulation was heavy and needed cleaning out?

A. Yes, that was after I served a notice of 24 hours on the owners; I would clean off the walks under the direction of the Common Council and turned in the time to the City Clerk.

Q. During the time you were chief of police in

(Testimony of George Dooley.)

the town of Cordova, do you recall ever notifying the owners of Lots 7 and 8 and Lots 25 and 26, Block 7, to keep obstructions out *the* the Burkhart alleyway?

A. As chief of the fire department and as chief of police, I made it a point to always keep that passageway clear and notified the owners that I didn't want any obstructions in that alleyway in case of fire, as I wished to go through there with the apparatus.

Q. You used the Burkhart alley during that time when occasions required to pass through with the fire apparatus? A. I did.

Q. Were you in the town of Cordova this last summer when a fire occurred in the Burkhart apartments on Lot 25, Block 7?

A. I was in town but at home quarantined with the smallpox at that time.

Mr. DONOHOE.—That is all. [97—58]

Cross-examination.

(By Mr. GRAHAM.)

Q. During all the time that you used this alley, went through it, etc., you could plainly see that the buildings were so constructed that the overhead part of the two buildings on either side of Burkhart Alley on Lots 7 and 8 in Block 7 occupied the entire space over the alley, couldn't you?

A. That they were connected—yes, sir.

Q. And when you went through there there was no snow ever accumulated in that portion?

(Testimony of George Dooley.)

A. No, sir, except at the rear in the alley or in the front, on the sidewalk.

Q. Brought in or dragged in by people traveling back and forth in there but no great accumulation of any quantity of snow?

A. Not in the alley itself,—at the extreme end.

Q. Where the other alley crosses it?

A. Yes, sir.

Q. There would be some snow from the other alley? A. Yes, sir.

Q. And this so-called Burkhart Alley or hallway through that building was practically enclosed?

A. Enclosed overhead.

Q. On both sides?

A. I wouldn't call it enclosed on both sides; during all of this period there was about 60 feet of show-window that ran on the lot.

Q. That was an enclosure?

A. Yes; that was an enclosure.

Q. And that entirely protected it from the storms and elements and wind? A. Yes, sir.

Q. It was just like passing through a building to go from Second to [98—59] First Avenue through that building to the alley behind it, the regular alley?

A. Well, there was a passageway—I wouldn't call it passing through a building.

Q. There was a building over your head and on both sides and still you are not passing through a building? A. I wouldn't call it a building.

Q. What would you call it? A. A passageway.

(Testimony of George Dooley.)

Q. Through what? A. Under the buildings.

Q. You don't go down under the floors of the buildings? A. No.

Q. A passageway through the buildings on the street level? A. Yes, sir.

Q. In case of a fire to property right around in that immediate vicinity you wouldn't expect the property owners to object to your going through there to protect this property and other property adjoining it? A. No, sir.

Q. And you would naturally expect, regardless of whether it was a public passageway or a private way, you would naturally expect for mutual protection and benefit to the property itself that the people would permit the use of the fire department, going through that alley?

A. Yes, I would expect they would.

Q. And it was to their interest to keep it open for that purpose, to let the fire department use it, whenever there was occasion to take it through there? A. I believe it would be; yes, sir.

Q. The only purpose for which you could take fire equipment through [99—60] that place would be for the protection of the property immediately adjacent thereto, would it not?

A. Well, yes, I would say it would be handy for that.

Q. It is all built up continuously from these buildings north of C Street? A. Yes, sir.

Q. And is built up solidly from the buildings south to B Street? A. Yes, sir.

(Testimony of George Dooley.)

Q. So that if there was a fire anywhere in that block it would be a matter of considerable concern to the property owners on either side of that so-called alley? A. Yes, sir, it would.

Q. Will you please state the name of the owner of Lot 7 in Block 7 whom you notified to clear the alley of obstructions?

A. Not of obstructions—I think it was to repair the walk I testified about.

Q. You testified you notified the property owners to keep that clear so you could get through if there was a fire?

A. I notified, on one occasion, Mr. Harwood. There was some beer kegs in the alley. I notified Mr. Reedy to repair the walks and notified Mr. Burkhart.

Q. When was it you notified Mr. Harwood?

A. I couldn't recall the date. It was in 1910, I think.

Q. Summer-time or winter-time?

A. I think it was in the fall. I returned in September of that year from the states and I think it was after I returned.

Q. Who was present when you notified him?

A. I don't know that anybody was present. I told him to take up the obstruction there in case of a fire and he immediately had his porter put them in the basement.

Q. Did you tell him you ordered him to do that as chief of police? [100—61]

A. I didn't really order him. I called his atten-

(Testimony of George Dooley.)

tion to it and told him the passageway should be kept free, always had been.

Q. And he was very willing to keep it open?

A. Yes, sir.

Q. And moved kegs? A. Yes, sir.

Q. You didn't tell him by authority of the city or by authority of your being chief of police you ordered him to do that?

A. I told him just what was to be done. I didn't notify him that I was chief of police and chief of the fire department; he knew that, and was working in perfect accord on things of that nature and did it willingly.

Q. And would have done it whether it was a public alley or private alley?

A. I presume he would.

Q. You would simply expect him to do that as a matter of public protection?

A. As a good citizen—to protect the rights of others and his own, he would do it, without any ordering that it be done.

Q. What about this repairing of sidewalks that you said you ordered some one to do—who did you order to repair sidewalks?

A. I had that conversation with Mr. Reedy.

Q. Who was Mr. Reedy?

A. At that time he was a partner in the firm of Slater, Reidy & O'Neill in the grocery-store now occupied by the Northern Drug-store.

Q. He was a partner in a grocery concern that occupied one of these buildings?

(Testimony of George Dooley.)

A. Yes, sir. They used to truck a great deal of their merchandise from what is now the old jail, the marshal's office, down through there and several boards at the intersection of the [101—62] alley and Burkhart Alley became damaged and I called his attention to it—that there was a couple of boards broken.

Q. They were in the main alley, were they, not the regular alley—between the portion of Burkhart Alley that goes in the passageway and the other portion? A. Yes, they were in the main alley.

Q. And that was a part of the planking in the public alley that runs north and south?

A. No, it was a part of the planking in this passageway that runs east and west.

Q. In this building? A. Under this building.

Q. When did you notify Mr. Reidy of that?

A. Shortly after I discovered it.

Q. How much of a hole was there there?

A. A couple of boards were cracked and I took it he would be glad to be notified of those things, someone might step in and turn an ankle.

Q. If he was the owner of that passageway through there and permitted people to go through, you thought he would like to be notified if there were any defects in the walk?

A. I knew he and his employees had broken them with the truck and merchandise.

Q. The reason you notified him was because you thought he would like to have the matter brought to his attention? A. And public safety.

(Testimony of George Dooley.)

Q. Safety of everybody, whether it was public or private? A. Yes, sir.

Q. You did that wherever you found defects in sidewalks? A. Yes, sir, any place.

Q. Did you tell them that under your authority as a representative [102—63] of the city you required him to fix that?

A. I didn't tell him that; he knew I was such officer and I didn't tell him under authority of that kind.

Q. What did you say to him?

A. I couldn't recall the exact words I said at this time. I possibly told him the walk needed repairs and ought to be fixed before someone got hurt.

Q. That is about what you would say to him.

A. Yes, that is about what I would say to him in a case of that kind.

Q. In other words, you told him the walk needed repairs and he had better repair it before someone got hurt?

A. Something of that kind. I don't recall the exact words now.

Q. There were other lights in this passageway that extends through these two buildings called Burkhart Alley, besides the city light you spoke of, was there not? A. None I recall.

Q. Is it not a fact that there were one or two or two or three other lights in that passageway that were some distance from the street?

A. I don't recall any.

Q. Never saw any? A. None I remember.

(Testimony of George Dooley.)

Q. You won't say there were no other lights in there?

A. I wouldn't say there was not; no. I will say that the passageway, while occupied by the Lindig restaurant and by Harwood along that 60 ft., along the north side, of the passageway, up to a reasonable hour in the evening, the passageway was lit up by the lights in the different business houses in the alley. I don't know of any light but the one during the darker hours. [103—64]

Q. You wouldn't say there wasn't any?

A. No, I wouldn't say there wasn't any.

Q. There was a cellar under the floor of this passageway?

A. There was an entrance to cellars in this passageway, yes; one went into Ashland's saloon and one went under the Horseshoe, and if I am not mistaken there was another one, a little further back, under where Harwood and Lindig was.

Q. Those were in the floor of the passageway?

A. Yes; shoots going into the floor of the passageway.

Q. And in the building on Lot 8, Block 7, the one on the southerly side of this so-called alley, there was a door which swung out into the alley, was there not?

A. That is the building now occupied by the Bank of Alaska. I have forgotten which way the lots run—which is the Horseshoe, Lot 7 or 8.

Q. That is 8—I asked you about the one where the Bank of Alaska is now?

(Testimony of George Dooley.)

A. Yes, there were two passageways there, two entrances.

Q. At one of those, the door when opened, would have extended out into the alley?

A. Yes, the one going upstairs to the halls, above the bank, swings out.

Q. Now, this business of handling the snow in the alley there, in reference to the Burkhart flats that you spoke to Mr. Burkhart about—was with reference to the apartments, the flats? A. Yes, sir.

Q. He said he would be glad to have you do it, as to do it himself, it was cheaper? A. Yes, sir.

Q. And it was an accommodation for him in that respect, when you were there with your crew, to shovel the snow out? [104—65] A. Yes, sir.

Q. The same as you would at any other place where you had occasion to shovel snow from the sidewalks? A. The same thing.

Q. That was by some arrangement you had with Burkhart?

A. That was on one occasion, yes, sir—he had me do that.

Q. He told you to go ahead and do it and he would reimburse you for your time?? A. Yes, sir.

Q. That had nothing to do with Block 7 and 8?

A. No.

Q. How did the appearance of this alley, so-called Burkhart Alley, when you make your entrance from First Street, compare with the appearance of other alleys in the city, public alleys—the same or was it different?

(Testimony of George Dooley.)

A. Of course, the alley as it appears now is changed. At one time the Horseshoe entrance used to be right on that corner, that would be on the northerly side of the building on Lot 8, the bank building, swinging doors on the corner, that came right out, half in the alley and half possibly out on to Front Street. Your question was, how does that compare with other public alleys?

Q. Yes. What is the appearance of it with reference to other public alleys?

A. I would say that this alley was boarded in the bottom and kept cleaner than most of our public alleys.

Q. It was a regular floor, the whole width of the alley? A. Yes, sir.

Q. And the floor extended out from one end of the building to the other end of the building?

A. Yes, sir. [105—66]

Q. All walled up on both sides?

A. At times it was walled and other times it was not; glass fronts in some of it there.

Q. There were parts of the buildings extended overhead clear to the center of the so-called alley?

A. I think they do; yes.

Q. You know it?

A. I don't know whether they infringe on one another or not. I say they joined.

Q. To the approximate center?

A. I would say so; yes.

Q. And are there any public alleys in the town of Cordova where the private buildings extend clear

(Testimony of George Dooley.)

over to about the center of the alley and join over the alley?

A. No; I don't know of any other public alley.

Q. It don't look just like a public alley, then, or any other alley?

A. No, it is not like our regular alleys; no.

Q. Is it like any other alley in the city?

A. Well, they use the alleys for passageways here, too.

Q. You can answer my question: Is it in appearance like other alleys in the city or any other alley?

A. Well, I wouldn't say that it was; no.

Q. Is there any other alley in the town of Cordova that is entirely floored over?

A. None I know of.

Q. Is there any other alley in the town of Cordova where the buildings on either side project entirely over the alley and come together over it, so you go in under the buildings or through the buildings?

A. No, sir, none I know of. [106—67]

Q. Now, in what respects did it resemble the other alleys in the city or public alleys in the city?

A. Well, I don't know; I never termed it an alley except in name.

Q. What I am asking is, how did it resemble an alley?

A. I don't think it bears any resemblance to an alley.

Q. You don't think it does? A. No, I do not.

Q. It is in the same condition substantially now that it was nine or ten years ago?

(Testimony of George Dooley.)

A. Practically the same.

Q. As far as appearances are concerned?

Q. So it looks to you?

A. Yes; I would say there were a few little minor changes, boarding up windows and little changes of things there.

Mr. GRAHAM.—That's all.

(By Mr. DONOHOE.)

Q. Mr. Dooley, by what name is this passageway called, been generally called, since it was opened up?

A. I have heard it called by two names—the Burkhart Lane and Burkhart Alley.

Q. You spoke of notifying Mr. Harwood to remove some obstructions—at that time was Harwood the lessee and in possession of the building, the building on Lot 8, which faced on First Avenue?

A. He was.

Q. He was then conducting the Horseshoe Saloon in that building? A. Yes, sir; he was.

Q. You said something about cellars being under a portion of this alleyway—I will ask you if there were trap-doors or doors in the [107—68] floor of the alleyway—if that was the means of reaching these cellars?

A. It was; there were trap-doors and shoots into it.

Q. Are those the same kind of doors used in the sidewalks or streets of Cordova where people have shoots leading down to the basements in the sidewalks? A. Of a similar nature; yes.

Q. And when the doors were closed, they became

(Testimony of George Dooley.)

a part of the floor of the alleyway? A. They did.

Q. I forgot to ask you—what business are you in at this time? A. Hotel business.

Q. How long have you been engaged in the hotel business, in your present hotel business?

A. About two years.

Q. Where is your business situated?

A. The Cordova House.

Q. On First Avenue?

A. On First Avenue, yes, sir.

Q. Have you for the past three or four years had occasion to rent apartments or small houses in the town of Cordova? A. I have.

Q. Where are these houses situated?

A. I have sixteen on Second Avenue here, acrossed to A Street, 16 small cabins, apartments, I am looking after, just in the rear of the Modern Laundry, known as the Hall property.

Q. You are familiar with the rents that small apartments or cabins can rent for on Second Avenue and vicinity in the town of Cordova?

A. Yes, what I am looking after; I am pretty well conversant with it. [108—69]

Q. Are you somewhat familiar with the apartments in the building on Lot 25 in the town of Cordova? A. Yes, sir.

Q. I will ask you what, in your opinion, would be the decrease, if any, in the rental values of the apartments in the building on Lot 25 in Block 7 should the westerly end of Burkhart Alley be closed so that the public could not use it for a public thoroughfare?

(Testimony of George Dooley.)

Mr. MEDLEY.—I object to the question. It has no bearing on the point in issue in this case, whether the alley is a public alley or not; it is irrelevant.

Mr. DONOHOE.—It is not asked for that purpose, but to show special damages.

The objection was by the Court overruled; to which ruling the defendants are allowed an exception.

A. I would say that the decrease in the rentals would be very material—about how much I couldn't exactly say.

Q. Have you under your charge and control other small houses between First and Second Streets that you have been renting? A. I have.

Q. Up until a short time ago what entrance did you have for those houses?

Mr. GRAHAM.—They are not on this lot, are they?

Mr. DONOHOE.—No, they are not on this lot.

Mr. GRAHAM.—We object to the question as incompetent, irrelevant and immaterial, and argumentative.

Mr. DONOHOE.—The object of the testimony is to show the basis on which he bases his opinion that this property would be materially decreased, the rental value, by the closing of the alley.

Objection overruled; defendants allowed an exception.

A. The entrance along or off of Second Avenue leading along the [109—70] stairway up to the street and entrance in the regular alley between

(Testimony of George Dooley.)

First and Second and the one most used was through the property of Joe Hall out to First Avenue.

Q. Then these buildings up to recently had an entrance way from First Avenue to the building?

A. Yes.

Q. And has that entrance from First Avenue been recently closed? A. Yes, sir.

Q. What effect did it have upon the rental value of these buildings? A. I lost two tenants.

Q. Where is the main business portion of the town of Cordova? A. First Avenue.

Q. Now, you stated that in your opinion the rental value of these apartments of the building on Lot 25, Block 7, would be materially decreased if the western end of Burkhart Alley was closed—will you state to the Court any reasons that convince you that the rental value of these apartments would be decreased?

A. If that entrance is closed people renting houses or apartments of that nature would rent any place else in preference to going there, or move, because they would have to make a detour around B Street or C Street to get to First Avenue and they would naturally rent places closer to the business section of the town.

Q. As the situation is now, with the Burkhart Alley open to First Avenue, it makes the apartments convenient to the business section of the town? A. I would say it did; yes, sir.

Mr. DONOHUE.—That is all. [110—71]

(Testimony of George Dooley.)

(By the COURT.)

Q. You have testified that you knew no other alley in the town that appeared similar to this alley; do you know of any other place in the town where property owners in the middle of a block, in constructing their buildings, have left a space that would make an alley such as this? A. I do not.

Q. In passing through this alley for the several years which you have testified that you have passed through it, in your capacity as chief of police and chief of the fire department or as a private individual, have you seen in the alley and on the sides thereof, or at any of the corners at the entrance to the alley from either First or Second Street, any signs or notices designating it either as a public or as a private thoroughfare?

A. The only sign of that nature I ever remember seeing there was recently, during the period of the fencing in, on the drug-store side.

Q. I had reference to prior to that?

A. No, sir; none whatever.

Q. Neither public nor private?

A. Never, nothing of that kind.

Witness excused. [111—72]

Testimony of Ed L. Harwood, for Plaintiffs.

ED L. HARWOOD, a witness called and sworn in behalf of the plaintiffs, testified as follows:

Direct Examination.

(By Mr. DONOHOE.)

Q. What is your name and place of residence?

(Testimony of Ed. L. Harwood.)

A. Ed L. Harwood; Cordova.

Q. How long have you resided in Cordova?

A. About eleven years.

Q. What is your business or occupation?

A. Billiard-hall, cigar-stand.

Q. *What* is that situated? A. In Block 7.

Q. How far is it from Burkhart Alley?

A. Twenty-five feet—twenty feet rather.

Q. You have lived here continuously since 1908?

A. I have.

Q. Were you at one time the lessee of the building on Lot 8 in Block 7 owned by Mr. Burkhart?

A. Yes, sir.

Q. How long were you lessee of that building?

A. About ten years.

Q. And you conducted in that what was known as the Horseshoe Saloon? A. Yes, sir.

Q. That building lies along the southerly side of Burkhart Alley? A. Yes, sir.

Q. And faces out on First Avenue?

A. Yes, sir.

Q. Do you know when Burkhart Alley was opened up and the public commenced to travel through it?

A. I think it was in the fall of 1908.

Q. Do you know to what extent Burkhart Alley was used by the traveling [112—73] public going between First and Second Streets in the town of Cordova since it was opened up in the fall of 1908?

A. At the time the postoffice was on Second Street

(Testimony of Ed L. Harwood.)

it was used about the same as First Avenue was—at that time.

Q. Used as much as First Avenue?

A. Yes, sir.

Q. Since the postoffice was moved about a year ago on to First Street, what would you say as to the use of the alley?

A. It wasn't used so much as it was before.

Q. Would you say that it was used by any number of people who had business up on Second Street?

A. I should judge it was used; I know I used it—any time I wanted to go out I always used it.

Q. You used it going home? A. Yes, sir.

Q. Where is your home?

A. C Street, corner Third.

Q. And you have used the alleyway in going to and from your residence? A. Always.

Q. Have you since you built your residence—you have used it ever since you built your residence on the corner of C and Third? A. Yes, sir.

Q. Did anyone at any time ever offer any objections or make any objections to your using that alley? A. They did not.

Q. Did you ask permission from anyone to use the alley? A. No, sir.

Q. What can you say as to whether or not Burkhardt Alley has been continuously used by the traveling public of the town of Cordova [113—74] since the fall of 1908?

A. I don't see any difference from their using

(Testimony of Ed L. Harwood.)

any public thoroughfare, First or Second or any other street in the city.

Mr. GRAHAM.—We move to strike the answer as not responsive.

Motion denied; defendants allowed an exception to the ruling.

Q. Mr. Harwood, when you were entering into your lease with Mr. Burkhart for the building on Lot 8 in Block 7 of the town of Cordova, did you have any discussion with Mr. Burkhart about what is known as Burkhart Alley?

Mr. GRAHAM.—We object to that as incompetent, irrelevant and immaterial.

The COURT.—Your contention is that the discussion of the predecessor in interest would bind the present owners?

Mr. DONOHOE.—Yes, sir. We claim there was an actual dedication, if not an actual dedication, there was a common-law dedication or a dedication as established by prescription. If we can establish an actual dedication statements made by him during the time he was the owner of the property in question would tend to establish an actual dedication. An actual dedication would become a public street immediately upon the dedication; a common-law dedication, of course, has to be a number of years of uninterrupted use.

Mr. MEDLEY.—Mr. Burkhart is not the predecessor in interest of Mr. Slater. Even though it was admitted as against the Bank of Alaska, it could not be admitted as against Mr. Slater.

(Testimony of Ed L. Harwood.)

The COURT.—It may be admitted for that limited purpose, as to the Bank of Alaska.

To which ruling of the Court defendants are allowed an exception.

Q. Answer that question, yes or no?

A. Yes, I did.

Q. Just state what statements were made by Mr. Burkhart in reference [114—75] to the Burkhart Alley at that time?

Mr. GRAHAM.—We object as incompetent, irrelevant and immaterial.

The COURT.—The objection will be overruled and exception allowed. It will be admitted for the limited purpose indicated.

A. The principal reason I rented or leased the building was on account of the alley and it was understood—

Mr. GRAHAM.—We object to that.

Q. State what Mr. Burkhart said to you.

A. He told me that he and Bob Ashland had agreed to keep that open and that they entered into an agreement to donate four feet all the way through on the alley.

Mr. GRAHAM.—We move to strike the answer as being hearsay; if the declaration could be allowed at all, it would be public reference—it is not reference of some one individual; it would have to partake of a public nature.

The COURT.—It will be considered for the limited purpose stated, and the motion to strike will be denied and exception allowed.

(Testimony of Ed L. Harwood.)

Q. He said they each had donated four feet for the alley? A. Yes, sir.

Q. The alley at that time was being used by the traveling public? A. It was.

Q. Now, during your occupancy of the Horseshoe Saloon, which lies along the southerly side of the Burkhart Alley, did you have occasion to take up the question of keeping the alley clear from obstructions with Mr. Bob Ashland, the then owner of Lot 7, Block 7? A. I did.

Q. State what was done in that respect and what was said by you to Mr. Ashland and by Mr. Ashland to you.

A. I told Mr. Ashland that I was the lessee of the property and [115—76] unless he kept his side clean, kept obstructions out of the alley, that I would have to board up our half of it, at that time.

Q. What obstructions did Ashland have in the alley at that time?

A. He had lumber, beer kegs and whiskey barrels and one thing and another.

Q. What did he do after you demanded of him not to obstruct the alley?

A. He cleaned it up and always kept it clean after that.

Q. He always kept it clean after that?

A. Yes.

Mr. DONOHOE.—That is all.

(Testimony of Ed L. Harwood.)

Cross-examination.

(By Mr. MEDLEY.)

Q. Mr. Harwood, what time did you start your poolroom at your present place?

A. 1909; I think it was in July we opened up the billiard-hall.

Q. After you had rented the room and building from Ashland?

A. Yes, a year after—not a year but close on to a year; about nine months, I think.

Q. Did you use the basement of that buliding at all? A. The basement of the bank building?

Q. Yes.

A. Yes, my storeroom was there, altogether.

Q. Did part of it extend underneath the alley-way?

A. No, it did not; only the door or stairway.

Q. You had a chute running down?

A. Yes, a stairway running down.

Q. Did you have a light in the alleyway that you paid for?

A. Yes, we paid for the light there—I paid for one light propably [116—77] four or five years.

Q. Were there other lights in the alley that were paid for by private persons instead of by the city?

A. At the time that Reidy & MacDonald were at that place they had lights put in there and Burkhart himself had a restaurant in the back end of this building, a cafe-house, that was lit up, that had plate-glass windows, a glass front, and on the other side, after Burkhart put up the next building and

(Testimony of Ed. L. Harwood.)

started his restaurant there, he had a big globe out in the alley. He didn't have the building that is there now; he had a little place at that time, used for a little coffee-house, where the Herald Building is now.

Q. How many lights would you say there have been in the alley that were paid for by private persons?

A. When Lindig was there he had a sign out. He had a light in front of his place and there was one at the end of the alley, next to the alley, the main alley, and one on the front.

Q. Did the city ever pay for those lights while you had a store on the alley?

A. The last three or four years I paid for no lights there at all and I don't know whether the city paid for them or who paid for them.

Q. Up to that time you had paid for them?

A. I paid for one light there. We had an understanding, when O'Neil & Slater took the grocery-store there, that they would pay for one end and I paid for the other.

Q. The lights in the alley?

A. I think that was the arrangement at that time.

Q. What time was that?

A. Probably three years ago, I think, or four years ago—I don't remember just what year it was.
[117—78]

Q. All the time that you have been in Cordova, the general physical arrangement of the alley was the same as it is at present?

A. Yes, the same, only it has been boarded up.

(Testimony of Ed L. Harwood.)

They had changed the entrances two or three times. They used to have corner entrances there, both the entrance to the saloon and also the entrance to the drugstore—that was changed at one time.

Q. But the buildings on Lot 7 and 8 have always covered over, made a roof to the alley?

A. Yes, sir.

Q. And anybody coming into that alley or wishing to use it, could see it was so covered?

A. Yes, they certainly could.

Q. You wouldn't say, Mr. Harwood, that that alley was like any other street or highway, being covered like that, and people living over it—people did live over it at one time? A. Yes, sir.

Q. They have, pretty near continuously, ever since the buildings were erected? A. Yes, sir.

Mr. MEDLEY.—That's all.

(By Mr. DONOHUE.)

Q. You spoke of some plate glass put in along the northerly side of the Burkhart Alley, in the building on Lot 7, Block 7, which is now the Slater Building. What was that plate glass put into the building for?

A. In order to show the goods up—they used it for a front.

Q. Display windows?

A. Just the same as the front would be. [118—79]

Q. Could the displays in this plate-glass window be observed from the sidewalk along First Street or would only people traveling through the alley see the display?

(Testimony of Ed L. Harwood.)

A. You would have to walk back in order to see it, I suppose.

Q. It was like a display window along the front of the store, in a street, or on a sidewalk?

A. Yes, sir.

Q. You spoke of someone having a globe out in front of the restaurant and a sign out. Was that sign in position to attract the attention of the people traveling along the sidewalk on First Street and of the people traveling through Burkhart Alley?

A. I think it would attract them from First Avenue and Second Avenue, and they could see the restaurant by going through the alley.

Q. Where was the sign, how far back from First Avenue? A. About halfway.

Q. That would be about 50 feet from the front of the building?

A. Yes, about 50 feet from the front of the building.

Q. It was a display sign that a man would ordinarily put out in front of his business for people traveling along the sidewalk? A. Yes, sir.

Q. Mr. Medley has asked you a question, something about the basement or cellar and the entrances to them—were there trap-doors from those entrances? A. Yes, sir.

Q. The same as is ordinarily used in the sidewalk where they have an entrance to the basement from the sidewalk? A. Yes, sir; just the same.

Q. And when they closed the door, would con-

(Testimony of Ed L. Harwood.)

stitute a part of the floor of the walk?

A. Yes, sir. [119—80]

Q. You were asked if this alley in any manner resembled other alleys or streets in the town. I will ask you if the travel through and over this Burkhart Alley was any different from what it was along the ordinary sidewalks of the town of Cordova?

A. Just in this way—that I have never seen any thoroughfare or alley that was boarded over.

Q. That was the only difference—the top?

A. Yes, sir.

Q. But so far as the use of the walk through there, what would you say, as to its being the same as that of any other sidewalk in the town?

A. The same purpose.

(By Mr. GRAHAM.)

Q. I believe you stated on your direct examination that the amount of travel on this Burkhart Alley equaled the amount of travel on First Avenue during the time the postoffice was in the building up here on Second Avenue—during that period practically all the business houses of the town were on First Avenue? A. Yes, sir.

Q. And all the travel from one business place to the other in the town, except the postoffice, would be along First Avenue?

A. It wasn't all on First Avenue at that time.

Q. What business houses were on Second Avenue at that time? A. Blum, O'Neill Company.

(Testimony of Ed L. Harwood.)

Q. They were on the corner of Second and B Streets? A. Yes, sir.

Q. And to reach that point, the rear door of their place was on B Street, near the main alley running north and south? [120—81]

A. Yes, sir.

Q. And the front door opened out on Second Avenue, near the corner? A. Yes, sir.

Q. They had a good walk, a public street, along the side of their building and from the front of it, down to First Avenue? A. Yes.

Q. What other building was on Second Street?

A. Reidy & MacDonald, across the way, had a store there.

Q. What other buildings?

A. There was the Windsor Hotel.

Q. That is still there? A. Yes, sir.

Q. What other buildings?

A. The Ostrander Building.

Q. That is where the postoffice was—used as a postoffice and hospital? A. Not at that time.

Q. It was used as a hotel at that time?

A. Yes, sir.

Q. What other buildings on Second Street?

A. That is all—practically all the business houses.

Q. What business houses were on First Avenue at that time—who kept the store now occupied by Blum-O'Neill Company?

A. The Adams Drugstore.

Q. Who kept the store now occupied by Clayson

(Testimony of Ed L. Harwood.)

next to that? A. The Clayson clothing-store.

Q. And the next store south of there?

A. It was occupied by the White Company, from Valdez.

Q. What kind of a business was that?

A. Saloon and billiard-hall and bowling-alleys.
[121—82]

Q. And all the buildings now on that side of First Street were then occupied by businesses of various sorts? A. Yes.

Q. And the business houses on the easterly side of First Avenue and south of B Street which are now occupied for business purposes were then occupied in some manner, probably?

A. Most of them; yes.

Q. How many saloons were there in Cordova at that time? A. Twenty-two.

Q. How many on First Avenue?

A. They were all on First Avenue with the exception of one or two, I believe.

Q. Where were they?

A. There was one in the Windsor Hotel and one on the corner, this side.

Q. What street? A. On Second.

Q. In other words, there were two saloons on Second Avenue and twenty on First Avenue?

A. Yes, sir.

Q. All the travel between these saloons on First Avenue would pass along First Avenue and not through Burkhart Alley?

A. You understand there is a heavy grade going

(Testimony of Ed L. Harwood.)

up the street towards the Blum store.

Q. I am asking about the travel between the saloons on First Avenue, these twenty saloons—people passing from one saloon to another on First Avenue didn't use Burkhart Alley?

A. No, sir.

Q. So all that travel was on First Avenue?

A. Yes, sir.

Q. Now, the postoffice travel, the bulk of the travel, was through [122—83] the Burkhart Alley? A. Yes, sir.

Q. You had how many mail trains a week during that time?

A. One a week, I judge, during that time.

Q. And about once a week people went to the postoffice to get mail coming from the Copper River Valley and over the railroad line—that was about it, was it?

A. We have mail coming in from the westward.

Q. Let us dispose of the railroad first. About once a week they had occasion to go to the postoffice to get mail from the railroad?

A. I wouldn't say once a week; I generally go to the postoffice probably once a day.

Q. People had occasion to go to the postoffice about once a week to get the mail from the railway line, something like that?

A. We had trains making other trips during the week—sometimes two, sometimes one.

Q. During the greater portion of the time, how many trains a week?

(Testimony of Ed L. Harwood.)

A. Probably averaged two trains the year around.

Q. How many boats a week did you have?

A. One, sometimes two, a week.

Q. And on boat days the people would go to the postoffice and get the mail from the boats?

A. Yes, sir.

Q. And other times it was simply local mail in the town, drop letters—is that right?

A. Yes, sir.

Q. And the bulk of this travel that went through the Burkhart Alley went to and from the post-office?

A. I wouldn't say it went to and from the post-office [123—84]

Q. You didn't say that a few minutes ago?

A. I wouldn't say that it was used as much as First Avenue, but I say that alley was used publicly just the same as First or Second Avenue.

Q. Was it used half as much as First Avenue at that time?

A. I couldn't say how much it was used at that time, any more than I know it was used publicly and there was a lot of travel through that alley.

Q. You wouldn't say it was used as much as First Avenue at that time or half as much?

A. In answering the question, I was getting at the thoroughfare—that was a thoroughfare at that time and I judge as much for three or four years as First Avenue would be.

Q. That is your judgment, that there was as

(Testimony of Ed L. Harwood.)

much travel through that alley?

A. I wouldn't say there was as much but there was very nearly as much travel through that alley at that time.

Q. Where did they go to—what was the occasion to go through the alley?

A. The occasion was business, I suppose, up there.

Q. What business could they go to?

A. The business of the Blum-O'Neill Company—the biggest part of the travel—and the biggest part of the travel for the postoffice was that way.

Q. B and C Streets were both open at that time? A. Yes, sir.

Q. And had sidewalks? A. Yes, sir.

Q. It was handier for people coming from any point north of C [124—85] Street and First Avenue to go to the postoffice by using C Street, than it was to go up through the Burkhart Alley?

A. From that end, yes.

Q. People coming from down the old part of the town and going to the postoffice or to business places on Second Avenue would naturally come up Second Avenue from the old town—there is a good sidewalk up there and the shortest way?

A. Yes.

Q. There was considerable population at that time in the old town? A. Yes, sir.

Q. The population in the old town, the residence population, was greater than the population in the town of Cordova, wasn't it?

(Testimony of Ed L. Harwood.)

A. I shouldn't say so.

Q. Was it as much? A. No, sir.

Q. How did it compare?

A. There was no comparison; there were very few people in the old town.

Q. Have you any idea how many people there are in the old town now? A. Yes, sir.

Q. About how many?

A. About ten to one now to what there was at that time.

Q. What time now are you speaking of, any time during the past ten years?

A. No—the first year and a half or two years during the construction of the railroad. I am not talking of later years.

Q. That is the time you are talking about?

A. Yes, sir.

Q. The first year of the construction of the railroad—about what year was that?

A. 1909 and '10. [125—86]

Q. That is the period you say there was a great deal of travel through the Burkhart Alley?

A. Yes, sir.

Q. And that was the period they had twenty saloons on First Avenue and two on Second Avenue? A. Yes, sir.

Mr. GRAHAM.—That's all.

Witness excused. [126—87]

Testimony of H. C. Feldman, for Plaintiffs.

H. C. FELDMAN, a witness called and sworn in behalf of the plaintiffs, testified as follows:

Direct Examination.

(By Mr. DONOHOE.)

Q. What is your name? A. H. C. Feldman.

Q. Where do you reside? A. Cordova.

Q. How long have you resided in Cordova?

A. Since November, 1907.

Q. What business are you engaged in?

A. Hardware business.

Q. You are the owner of the Northwestern Hardware Company? A. Yes, sir.

Q. Where is your business situated?

A. On First Street between C & B.

Q. Close to the Lathrop Building?

A. Yes, sir.

Q. Are you acquainted with the Lathrop Building? A. Yes, sir.

Q. You know of the stores in the Lathrop Building that are occupied? A. Yes, sir.

Q. Do you know of the apartments upstairs?

A. Yes, sir.

Q. What, in your opinion, would be the decrease in rental values to the stores and apartments in the Lathrop Building if the Burkhart Alley was closed and the crosswalk from the westerly terminal of the Burkhart Alley acrossed First Street taken out?

A. That would be hard for me to say, how much the decrease would be.

(Testimony of H. C. Feldman.)

Q. Do you think there would be a serious decrease? [127—88]

A. There would be a decrease for the stores, but for the apartments I don't think there would be any.

Q. You think it would be a serious decrease for the stores? A. Yes, sir.

Q. You are familiar with Burkhart Alley?

A. Yes, sir.

Q. Were you in Cordova in the fall of 1908 when the Burkhart Alley was laid out?

A. Yes, sir.

Q. Do you know whether the general public have traveled the Burkhart Alley since the fall of 1908? A. Yes, sir.

Q. To what extent would you say the general public have traveled Burkhart Alley from the fall of 1908 up until the fall of this year, 1919?

A. Well, since the postoffice has been moved, I guess it has been a quarter or one-fifth less traveled through there than First Street, on the sidewalk.

Q. How much?

A. One-quarter or something like that—one-quarter of the traveling on this sidewalk, on this side of First Street, on the east side of First Street.

Q. It is your opinion that since the postoffice has been moved from Second Avenue that about one-quarter or one-fifth of the general travel along the easterly side of First Street goes up Burkhart

(Testimony of H. C. Feldman.)

Alley, going from First Street to Second Street?

A. Yes, sir.

Q. Or going from Second Street down to First Street? A. Yes, sir.

Q. Can you state whether or not Burkhart Alley has been continuously [128—89] used by the traveling public since the fall of 1908?

A. Yes, it has.

Q. Did you have any conversation with Mr. Burkhart in the fall of 1908 in regard to the opening up of Burkhart Alley? A. Yes, sir.

Q. State that conversation as near as you can remember.

Mr. GRAHAM.—We object to that as incompetent, irrelevant and immaterial.

The COURT.—The objection will be overruled; it will be admitted for the limited purpose I have indicated in the testimony of Mr. Harwood. Defendants will be allowed an exception.

A. When Mr. Burkhart started to build there he told me that he and Ashland and Finklestein had agreed to put an alley there—

Q. That he had agreed with Ashland and Finklestein to leave an alley from First Street to Second Street?

A. To make all these four corners, four corners.

Q. Did he say anything about the width of the alley?

A. I wouldn't remember that if he did.

Q. That statement was made by Mr. Burkhart at the time he was the owner or part owner of

(Testimony of H. C. Feldman.)

Lot 8 and Lot 25, Block 7? A. Yes, sir.

Mr. DONOHUE.—That's all.

Cross-examination.

(By Mr. GRAHAM.)

Q. This alley you call Burkhart Alley is a covered-over passageway through the buildings?

A. It is closed on top.

Q. How is it closed on top—what constitutes that enclosure?

A. The buildings on the two sides joining.

Q. And a portion of the two buildings over the alley are occupied [129—90] for private purposes? A. There are rooms there, I know.

Q. And they have been there ever since those buildings were constructed? A. Yes, sir.

Q. And with the possible exception of being vacant because of lack of tenants they have been occupied continuously since the buildings were erected? A. I suppose so.

Q. How does that passageway compare in appearance with public alleys in the city? How does its looks compare with the public alleys in the city, the public highways?

A. I would call it a public highway—it appears to me like a public highway.

Mr. GRAHAM.—We move to strike the answer as not responsive.

Answer stricken.

Q. Can you tell us how it compares in appearance with a public highway?

A. I don't know how to answer that question.

(Testimony of H. C. Feldman.)

Q. Does it have the same general appearance that any open public alley has?

A. It would if you simply look at it, yes—there is a thoroughfare there.

Q. You can look through a hole through the buildings, a passageway through the buildings?

A. It would all depend from where you look; if you stand right in front of it I would say anyone would consider it a public highway.

Q. Would you consider that anyone would consider it a public highway being roofed over and occupied over the top, over the alley— [130—91] people occupying it? A. Some of them would.

Q. Where have you ever seen a public highway that looked like that?

A. Not exactly that way, no.

Q. There is no such place in the town of Cordova, is there? A. No.

Q. It is all floored over, is it not—entirely floored over, the whole alley, from one end to the other of those two lots? A. Yes, sir.

Mr. GRAHAM.—That's all.

(By Mr. DONOHOE.)

Q. How does the Burkhart Alley compare with the sidewalks along the streets of the town of Cordova that foot-passengers travel?

A. You mean the looks of it?

Q. Yes; how does it compare?

A. It looks about the same.

Q. It is floored over just the same as the sidewalks—has a floor? A. Yes, sir.

(Testimony of H. C. Feldman.)

Q. And this overhead passage, the overhead joining of the buildings, does that in any way interfere with the ordinary use of the alleyway for people walking? A. No, sir.

Q. It is different from the regular alleys of the town, is it not, in that wagons and horses do not travel over this Burkhart Alley? A. Yes, sir.

(By Mr. GRAHAM.)

Q. Is it different in any other way?

A. From an alley? [131—92]

Q. Yes. A. No.

Q. How about the buildings over the top of it?

A. That would be the only difference.

Q. It is wholly enclosed except at the two ends?

A. It is only enclosed on top between the alley and First Street.

Q. That portion of it between the public alley that runs north and south and First Street is practically enclosed, with the exception of the ends of the passageway through there? A. Yes, sir; it is.

Q. Entirely closed, entirely enclosed, with the exception of the two ends? A. Yes, sir.

Q. So it is free from snow in there in the winter-time? A. Yes, sir.

Q. And protected and enclosed against the elements, wind and rain and snow, going in there?

A. To a certain extent.

Q. It is practically indoors, is it not, when you get in there?

A. If you get right in the center I suppose it would be.

(Testimony of H. C. Feldman.)

Q. The moment you step inside you are protected from any rain or snow?

A. You have to go pretty far in to be protected; drains from the roof are going right into the alley.

Q. Drains from the roof? A. Yes, sir.

Q. What roof?

A. From the roof of the Slater building.

Q. Drains where? A. Drains on to the alley.

Q. You mean there is a pipe running there? [132—93]

A. No, not a pipe; it drains from the roof, falls right on to the alley so you have to go at least five or six feet to be protected from rain.

Q. You mean over the alley where you go, there is no trough, nothing there, to prevent the rain dropping down on you from the building?

A. Yes, sir.

Witness excused. [133—94]

Testimony of E. V. Boyle, for Plaintiffs.

E. V. BOYLE, a witness called and sworn in behalf of the plaintiffs, testified as follows:

Direct Examination.

(By Mr. DONOHUE.)

Q. What is your name? A. E. V. Boyle.

Q. Where do you reside? A. Cordova.

Q. How long have you resided in Cordova?

A. About ten years.

Q. What is your business? A. Drugstore.

Q. Where is your store situated?

A. On First Avenue.

(Testimony of E. V. Boyle.)

Q. On which side of First Avenue?

A. I don't know whether it is the east side or west side.

Q. The side next to the bay? A. Yes, sir.

Q. The westerly side? A. Yes, sir.

Q. How far is it from the Lathrop Building on the westerly side of First Avenue?

A. It is probably 50 feet.

Q. In a southerly direction? A. Yes, sir.

Q. Were you living here in Cordova in 1908?

A. I was; yes.

Q. When the town was first being built?

A. Yes, sir.

Q. Are you acquainted with what is known as the Burkhart Alley? A. Yes, sir. [134—95]

Q. Were you residing in Cordova when the Burkhart Alley was opened up and first used in a public way or by the public? A. Yes, sir.

Q. Do you know whether or not since the fall of 1908 the general traveling public of the town of Cordova used Burkhart Alley whenever they had occasion to travel between First and Second Streets?

A. Yes, as far as I can remember—I don't recall any instance of when they did not.

Q. What can you say as to the extent of the travel over this Burkhart Alley since the fall of 1908?

A. Well, I have seen the alley used considerably; in fact, I have used it myself. I have seen most of the people use it from First to Second.

Q. Did you ever ask or obtain permission from

(Testimony of E. V. Boyle.)

anyone to use it? A. No.

Q. Did anyone ever try to prevent you using the alley freely as a public street? A. No, sir.

Q. You have been a member of the Common Council of the town of Cordova? A. Yes, sir.

Q. How many terms? A. I was on two years.

Q. And were you mayor for one of those years, or both?

A. I was mayor one year and acting mayor for most of the other year.

Q. During the time that you were on the Town Council of the town of Cordova, do you remember whether the municipality of Cordova furnished the lighting for Burkhart Alley?

A. When I was on the City Council we put in considerable lights, and these lights were separated, every so many feet, as agreed [135—96] upon and that would place one of them west of the Burkhart Alley on Second Avenue and in this particular instance we agreed to put it right opposite the alley.

Q. That is on Second Avenue?

A. On Second Avenue.

Q. Do you know who requested it to be put opposite the Burkhart Alley?

A. No, I do not—I think it was general discussion.

Q. During the time you were mayor or a member of the City Council do you know anything about a question coming up about the light placed by the city at the intersection of the Burkhart Alley with the regular alley running north and south?

(Testimony of E. V. Boyle.)

A. No, I do not.

Q. At one time you had a cross-walk, acrossed from the easterly side to the westerly side of First Avenue, in front of your store? A. Yes, sir.

Q. Did the City Council take any action regarding that street walk?

A. Yes, they had it removed.

Q. Why? A. They stated—

Mr. GRAHAM.—We object to the reasons.

Objection overruled; defendants allowed an exception.

WITNESS.—(Continuing.) The city objected on the grounds that if I was allowed to keep mine, everyone could place a walk opposite their place of business to the other side of the street, and for that reason it would interfere with the traffic and the looks of the street.

Q. Do you know whether or not the City Council only permitted the retaining of cross-walks at the intersection of streets?

A. In this particular case that was brought up, that sidewalks were only allowed opposite or at the intersection of streets. [136—97]

Q. Was the question at that time discussed regarding the cross-walk which joins on to the westerly terminus of Burkhart Alley?

A. I brought up the point at the time, stating that there was one allowed there and I couldn't see why I shouldn't have mine and they explained—

Mr. GRAHAM.—We object to this as incompetent, irrelevant and immaterial.

(Testimony of E. V. Boyle.)

Objection overruled; defendants allowed an exception.

Mr. MEDLEY.—I want to know with whom this conversation was held.

The COURT.—My understanding of it was, from the testimony, that the matter took place in the Council.

Q. Is that right, that this discussion was in the Council?

A. No; the discussion took place with some of the members of the council; particularly I can mention Doctor Chase. I think he was mayor of the town at the time my cross-walk was removed.

Q. Did the Town Council order you to take up your cross-walk?

A. They simply took it up; yes, sir.

Mr. GRAHAM.—We move to strike these conversations. It was no formal action of the council, but with individual members.

The COURT.—Part of the testimony is competent and part of it is not. The testimony that the cross-walk was taken out by the council would be competent, but the Court will not consider any matter that does not appear to have been the direct action of the council. I think that would cover it without going back over all the testimony.

Mr. MEDLEY.—The objection to that would be, if we have to get a record, there would be incompetent testimony in there that would prejudice the defendants. We understand it will not affect the decision of this Court.

(Testimony of E. V. Boyle.)

The COURT.—I tried to make the statement *sufficient* broad to cover it. [137—98]

Defendants allowed an exception to the ruling.

Mr. DONOHOE.—That is all.

Cross-examination.

(By Mr. GRAHAM.)

Q. At the time your cross-walk was taken up, there was also one opposite Clayson's?

A. Yes, sir

Q. That made three cross-walks between the regular cross-walks at B and C Streets? A. Yes, sir.

Q. So that vehicles passing along there would have to bump over three separate cross-walks in addition to the regular cross-walks? A. Yes.

Q. That is an exceptionally long block?

A. Yes, sir.

Q. It would be a matter of inconvenience to the public generally to have to go to cross-walks at either end of that block and pass acrossed the street, to go from one side of the street to the other?

A. Well, if they were forced to it would, of course.

Q. If the cross-walk was not opposite Burkhart Alley it would be a matter of general inconvenience to be required to go to the cross-walk at either end of that block? A. Undoubtedly it would.

Q. And the location of this cross-walk about mid-way between the ends of the block is a matter that serves the public generally and a matter of public convenience generally? [138—99] A. Yes, sir.

Q. So there is a walk acrossed from the Burkhart Alley? A. Yes, sir.

(Testimony of E. V. Boyle.)

Q. This Burkhardt Alley, which you say you passed through a great many times, has a good flooring in it, the entire length of the alley from First Street to the public alley on the south?

A. Yes; it is fairly well boarded.

Q. And the upper part is sealed just like the inside of the building would be?

A. Part of the alleyway is.

Q. That is that part from the public alley to First Avenue?

A. Between the bank and the drugstore.

Q. Now, the alley on either side is composed of the two buildings? A. Yes, sir.

Q. And the two buildings run over the alley?

A. Yes, sir.

Q. All that would be necessary to make a room out of that alley would be to put doors in the front and in the back?

A. Of course it takes considerably more than that to make a room out of it.

Q. To make a room out of it? A. Yes, sir.

Q. If enclosed at the front and at the back by doors at either end it would be a room?

A. Yes, sir.

Q. In the building? A. Yes, sir.

Mr. DONOHUE.—There never were any doors either at the front or back of that alley?

A. No, sir.

Witness excused. [139—100]

Testimony of H. I. O'Neill, for Plaintiffs.

H. I. O'NEILL, a witness called and sworn in behalf of the plaintiffs, testified as follows:

Direct Examination

(By Mr. DONOHOE.)

Q. What is your name? A. H. I. O'Neill.

Q. Where do you reside? A. Cordova.

Q. How long have you resided in Cordova?

A. Since November, 1908.

Q. What is your business? A. Merchant.

Q. Where is your business, your place of business? A. First Street, Cordova.

Q. You are one of the officers of the Blum-O'Neill Company? A. Yes, sir.

Q. General merchandise? A. Yes.

Q. And your store is on the corner of C and First Avenue? A. Yes, sir.

Q. Since you have been in the town of Cordova, since November, 1908, have you been engaged in the mercantile business? A. No.

Q. What were you engaged in?

A. I was a clerk for S. Blum first, up to 1912.

Q. And then did you engage for yourself in the mercantile business? A. Yes, sir.

Q. And since that time have you been in business either for yourself or with corporations in which you held considerable interest?

A. Yes, sir [140—101]

Q. In 1912 where did you commence your mercantile business?

(Testimony of H. I. O'Neill.)

A. Where the Northern Drug Company is now located, Lot 7 in Block 7.

Q. What was the firm or corporation that did business there?

A. We were operating under three names there—Reidy & Company, Reidy, Slater & O'Neill and O'Neill, Slater & Company.

Q. Reidy & Company—was that a copartnership?

A. Yes, sir.

Q. And Reidy, Slater & O'Neill was a corporation? A. Yes.

Q. And O'Neill, Slater & Company was a corporation? A. Yes, sir.

Q. How long did you do business under those three names? A. Until July 12, 1915.

Q. From 1912?

A. About February or March, 1912.

Q. Until July 12, 1915? A. Yes, sir.

Q. Now, during the time you were doing business on Lot 7, Block 7, did you own the property or did the corporation with which you were doing business ever own it? A. Yes, sir.

Q. When did you first buy an interest in Lot 7?

A. February or March, 1912.

Q. You bought that from David MacDonald?

A. Bought his interest out; yes, sir.

Q. Then you and Reidy held it as partners?

A. Yes, sir.

Q. You and Slater owned one-half and Reidy the other half? A. Yes, sir.

Q. And then later your corporation bought out

(Testimony of H. I. O'Neill.)

Reidy? A. Yes, sir. [141—102]

Q. When was that done?

A. I think it was in 1914.

Q. You are familiar with what is known as Burkhart Alley? A. Yes, sir.

Q. And you have been here and heard the witnesses testify as to where it is situated?

A. Yes, sir.

Q. Your business was being conducted along the northerly side of Burkhart Alley, at the First Street end of the alley, was it? A. Yes, sir.

Q. Did you, during the time you were in business there, have an opportunity to see whether the general public traveled this Burkhart Alley, going from First to Second and coming from Second to First?

A. Yes, sir.

Q. What would you say—was it generally traveled by people that wanted to go from one of those streets to the other? A. It was.

Q. Did you during any of the time you were owner or part owner, or a member of the corporations that did own Lot 7 in Block 7, ever at any time protest to the general public using this alley for a public thoroughfare?

A. No, sir.

Q. Did any of your partners or any members of your companies to your knowledge make any protest or objection to the general public using this alleyway as a public thoroughfare?

A. Not that I know of.

Q. On May 18, 1914, you were interested either

(Testimony of H. I. O'Neill.)

as a partner or member of the corporation that owned Lot 7, Block 7 of the town of Cordova? [142—103]

A. Yes, sir.

Q. Do you remember appearing before the City Council of the town of Cordova on May 18, 1914, and making a request of the City Council that they place some necessary lights in Burkhart Alley?

A. I remember of making that request but I don't remember the date.

Q. You remember it was some time while you were doing business on Lot 7 in Block 7?

A. Yes, sir.

Q. Do you remember what action the Council took on your request?

A. They put a light in the rear of the alley there.

Q. That is in the rear where the Burkhart Alley is intersected by the regular alley running north and south? A. Yes, sir.

Q. Do you know whether the city paid for that light? A. I presume they did.

Q. You did not? A. No, sir.

Q. Or your corporation? A. No, sir.

Q. Now, do you remember another time appearing before the Council and requesting the Council to move the lamp-post that was then placed on Second Street, about 50 feet north of the Second Street end of the Burkhart Alley, down to a point

(Testimony of H. I. O'Neill.)

immediately opposite the alley, so as to light the alley? A. Yes, sir.

Q. And did the City Council comply with your request? A. Yes, sir.

Q. This was done at the time also when you were part owner, either yourself or partner, in Lot 7, Block 7? A. Yes, sir. [143—104]

Q. Did you during the time you were doing business on Lot 7 in Block 7 have any conversation with Mr. Burkhart concerning the Burkhart Alley, in your store?

A. Not exactly conversation; just passing remarks.

Q. It wasn't a serious conversation?

A. No, sir.

Mr. DONOHUE.—That's all.

Cross-examination.

(By Mr. MEDLEY.)

Q. Mr. O'Neill, when you were in business there, either as a partner or member of the corporation and the firm you were a member of or the corporation in which you held stock was the legal owner of Lot 7, Block 7, did you and your partners consider that you owned the whole 25 feet of the lot?

A. We did.

Q. When you appeared before the City Council asking them to install a light at the point where the so-called Burkhart Alley crosses the regular public alley running north and south, was there any discussion before the Council at that time as to whether Burkhart Alley was a public alley or

(Testimony of H. I. O'Neill.)

a private alley? A. No, sir.

Q. Did you consider it a private alley at that time?

A. Running between the buildings there?

Q. Yes—the Burkhart Alley?

A. I considered it such; yes.

Q. You were a member of the Council yourself for some time? A. Yes, sir.

Q. When were you a member of the Council?

A. I believe it was in 1916. [144—105]

Q. You served a full term? A. Yes, sir.

Q. Did you attend meetings regularly?

A. Yes, sir.

Q. At any time when you were a member of the Council was there any discussion or action by the Council to the effect that the so-called Burkhart Alley was a public alley? A. No, sir.

Q. Now, the record shows that John Reidy, H. A. Slater and H. I. O'Neill conveyed to the Reidy, Slater & O'Neill Company, under date of October 3, 1913, Lot 7 in Block 7 of the Town of Cordova, as the same appears upon the official plat thereof in the Commissioner's office for the Cordova precinct. Do you remember signing such a deed? A. Yes, sir.

Q. Was it your intention to convey to the Reidy, Slater & O'Neill Company the full 25 feet of Lot 7 as it appears on the recorded plat?

A. That was my intention.

Q. There wasn't any reservation in the deed of a four-foot strip that had been used as a public

(Testimony of H. I. O'Neill.)

highway or public alley? A. No, sir.

Q. Later that same property was conveyed to Mr. Slater? A. Yes, sir.

Q. Who is the present owner? A. Yes, sir.

Q. Was conveyed by the O'Neill-Slater Company? A. Yes, sir.

Q. Did you convey to him the full 25 feet of Lot 7, Block 7 at that time? [145—106]

A. Yes, sir.

Q. The record shows that deed was dated April 15, 1917—is that right?

A. On or about that date.

Q. Did you or the firm of Reidy & Company or either of the corporations in which you were an officer, while occupying Lot 7, Block 7, pay for any lights in Burkhart Alley? A. Yes, sir.

Q. Between Lots 7 and 8? A. Yes, sir.

Q. Will you explain to the Court what lights you paid for and where they were?

A. We paid for the light right about in the middle of the alley.

Q. It was right in the middle of the alley?

A. Yes, sir.

Q. Was it placed about in the centre of the alley? A. It was both ways—the centre.

Q. Halfway between the public alley and the street and halfway between the sides, walls of the alley? A. Yes, sir.

Q. You paid for that light? A. Yes, sir.

Q. Do you know whether anyone else paid for light in the alley besides yourself?

(Testimony of H. I. O'Neill.)

A. Yes, we agreed to keep that light if Harwood would keep the front light.

Q. Where was the front light?

A. Just at the front entrance to the alley between the two buildings.

Q. Was it inside the alley? A. Yes, sir.

Q. About halfway between the side-walls of the alley, on the roof [146—107] of the alley?

A. Yes, sir.

Q. When you appeared before the Council—I don't remember the exact date but it was about the light which the Council or city put in where the main alley intersects Burkhart Alley—

A. Yes.

Q. Did you tell the Council at that time that private persons were paying for lights in the alley already?

A. That was the ground we were making the request on.

Q. You informed the Council at that time that you and Mr. Harwood were paying for lighting the alley.

A. That we were lighting our portion of the alley; yes, sir.

Mr. MEDLEY.—That will be all.

(By Mr. DONOHUE.)

Q. But you wanted the town to light a portion of the alley also? A. Yes, sir.

Q. Now, Mr. O'Neill, were you a member of the City Council in 1916?

A. Yes, sir; I believe it was 1916.

(Testimony of H. I. O'Neill.)

Q. On November 6, 1916, were you a member?

A. I am pretty positive it was 1916.

Q. It is already in evidence in this case—the following extract from the meetings of the City Council, on November 6, 1916, on page 437 of Book One of the minutes of the City Council, the following: It was reported that Burkhart Alley was in bad condition and it was decided that the owners should be notified to have it repaired. Do you remember that transaction taking place in the Council?

A. I wouldn't say positively as to that.

Q. You were just one term on the Council?
[147—108] A. Yes, sir.

Q. You wouldn't want to be understood that during the year you were on that Council that the Council never took any action at all in regard to Burkhart Alley, as to lighting it or repairing it, or anything of that sort? A. No, sir.

Q. They may have done so? A. Yes, sir.

Q. But you at this time just don't recall it?

A. Yes, sir.

Q. In these deeds of conveyance you have testified to—your deeds do not describe the lot as 25 feet width, it simply says Lot 7, Block 7, according to the plat of the town—you didn't sell this lot by metes and bounds, in other words?

A. I don't recollect as to that—what was included in the deed.

(By Mr. MEDLEY.)

Q. When the firm or corporations in which you

(Testimony of H. I. O'Neill.)

were represented owned the building, did people live upstairs on the second floor? A. Yes, sir.

Q. Did their living-rooms extend out from the end towards Lot 8? A. Yes, sir.

Q. Out as far as it could go? A. Yes, sir.

Q. People lived there? A. Yes, sir.

Q. Continuously, while you were there?

A. Yes, sir. [148—109]

(By Mr. DONOHUE.)

Q. Where was the entrance to these upstairs?

A. It was originally inside of the building and we changed it so it would run right off from the alley, where it now is.

Q. Off to the rear end? A. Yes, sir.

Q. Off the main alley, the regular alley?

A. Off of Burkhart Alley.

Q. Originally, it was just about the centre of the building, wasn't it, or about 50 feet from First Avenue and 50 feet from the regular alley?

A. No, it was about 75 feet from the front.

Q. That entrance was off of Burkhart Alley?

A. Yes, sir.

Q. Did you during the time you were occupying and were the owner of that Lot 7 maintain a sign in Burkhart Alley, close to the regular alley, which said rooms to rent?

A. No, sir; that was put there afterwards.

Q. You have seen that there—passing through there? A. Yes.

Q. There is a sign there? A. Yes, sir.

Q. So people passing back and forth through

(Testimony of H. I. O'Neill.)

Burkhart Alley would see the sign?

A. Yes, sir.

(By Mr. MEDLEY.)

Q. The light that the city put in the alley—please describe where that light is in relation to the regular alley running north and south through the block? [149—110]

A. It is right at the edge of the building. Here is the roof of the Burkhart Alley—this was the roof of the Burkhart Alley and there is the light hanging there (indicating).

Q. Which lights up the regular alley through the block, as well as the Burkhart Alley—that is the public alley? A. Yes, sir.

(By Mr. DONOHOE.)

Q. Isn't it back about 18 inches of two feet under the cover of the Burkhart Alley?

A. It was put back far enough to keep it from getting damaged from snow falling there.

Q. The purpose of putting in the light was to light Burkhart Alley?

A. We were anxious to keep the alley lit up; yes, sir.

Q. Burkhart Alley? A. Yes, sir.

Q. You know of no other place in Cordova where the City Council has placed a light along in the middle of the block—in other words, the city has not made it a practice to place lights in its alleys, has it?

A. I don't know of any other light in an alley.

Witness excused. [150—111]

Testimony of C. H. Scheffler, for Plaintiffs.

C. H. SCHEFFLER, a witness called and sworn in behalf of the plaintiffs, testified as follows:

Direct Examination.

(By Mr. DONOHOE.)

Q. State your name and residence.

A. C. H. Scheffler; Cordova, Alaska.

Q. What official position do you hold in the town of Cordova? A. Postmaster.

Q. How long have you been postmaster?

A. Almost four years.

Q. Where did you conduct the office, when you first took over the office?

A. In the Ostrander Building.

Q. On Second Avenue?

A. On Second Avenue.

Q. How long did you conduct your office, your postoffice, at that place?

A. Up to about the 18th of December, last year.

Q. 1918? A. Yes.

Q. About a year ago? A. Yes, sir.

Q. What was your business or occupation before you became postmaster?

A. Newspaper business.

Q. When did you first commence your residence in the town of Cordova?

A. About seven years ago.

Q. About 1912? A. Yes.

Q. Where are you conducting the postoffice now?

A. On First Avenue.

(Testimony of C. H. Scheffler.)

Q. On which side of First Avenue? [151—112]

A. On the bay side of the street?

Q. Are you familiar with Burkhart Alley?

A. I am.

Q. Have you, during your residence, used Burkhart Alley for traveling back and forth from First to Second Street at various times? A. I have.

Q. Did you use it frequently or otherwise?

A. I used it frequently.

Q. And how long have you continued the use of Burkhart Alley for traveling back and forth?

A. Since I have been here, practically.

Q. Since 1912? A. Yes.

Q. Do you use it some now? A. Yes, I do.

Q. Where do you reside now?

A. On the Hill, on B Street.

Q. Near Fourth? A. Yes, sir.

Q. What would you say as to Burkhart Alley, as to the amount of travel to and from Burkhart Alley, from 1912 up to the time you removed the post-office from the Ostrander Building—the volume of travel through there?

A. I couldn't say—it was constantly used by the public.

Q. What did you say as compared with B Street or C Street, between First and Second?

A. The comparison is about the same.

Q. Do you think there was as much travel along Burkhart Alley as there was over either of the other sidewalks? A. About, yes. [152—113]

Q. What would you say as to the travel on Burk-

(Testimony of C. H. Scheffler.)

hart Alley since you moved the postoffice to First Avenue?

A. It wouldn't be the same as it was.

Q. It would not be as much, the travel through Burkhart Alley? A. No.

Q. But as compared with B and C Streets?

A. I imagine the traffic is about the same.

Q. It is your opinion that the traffic through the alley is about the same as on B and C Streets?

A. Yes.

Mr. DONOHOE.—That will be all.

Cross-examination.

(By Mr. MEDLEY.)

Q. Where did you first live when you came to Cordova? A. In the Reception Building.

Q. How long did you live there?

A. Three or four months.

Q. And then where did you move?

A. Down where the Northern Laundry is now.

Q. On Second Street? A. Yes, sir.

Q. How long did you live there?

A. About a year, I think.

Q. Then where did you move to?

A. Then we moved down to the Custom-house—where the Custom-house used to be.

Q. Where is that?

A. Where the Cable Office was.

Q. At the foot of C Street? [153—114]

A. Yes, at the foot of C Street.

Q. Did you live there long?

A. No, we lived there about six months.

(Testimony of C. H. Scheffler.)

Q. Then where did you move to?

A. Up on First Avenue, the Campbell House.

Q. Up beyond the steamship office, between C and D Streets? A. Yes, sir.

Q. How long did you live there?

A. About four or five months; I don't remember how long.

Q. Then you went into the Shushana?

A. No; I was in the Shushana when we lived at the foot of C Street.

Q. How long were you in the Shushana?

A. About two months.

Q. Where did you move to after you left the Campbell House? A. Up on the hill.

Q. And have you lived on the hill ever since?

A. Yes, sir.

Q. You have lived up on the hill ever since you have been postmaster? A. No.

Q. You moved up there before you became postmaster? A. Yes, sir.

Q. Where were you working before you became postmaster? A. In the newspaper office.

Q. Where is that located? A. On C Street.

Q. When you lived at the foot of C Street in the Customs-house, you didn't have to go through Burkhardt Alley to reach your place of business?

A. Not necessarily.

Q. It would be out of your way to do so? [154—115]

A. Yes, going to and from work.

Q. When you lived in the Campbell House, it

(Testimony of C. H. Scheffler.)

would be out of your way? A. Yes, sir.

Q. When you lived up on the hill it would be out of your way to go through the Burkhart Alley?

A. Not exactly.

Q. Why?

A. Sometimes I would go through the Burkhart Alley; I would go through the Burkhart Alley when I lived in the Campbell House as well.

Q. It would be the longest way around for you?

A. Not necessarily—we did business with the Blum Company.

Q. I said going to your place of business?

A. Yes, sir.

Q. That would be the longest way around?

A. Yes.

Q. And you wouldn't use the alley?

A. I would sometimes, in traveling around town.

Q. Just walking for exercise? A. No.

Q. Just to look around?

A. On business—I wouldn't go through just for the fun of it.

Q. When you worked in the printing office were you confined to your business pretty closely?

A. Rather; yes.

Q. How many hours a day were you there?

A. From eight to sixteen.

Q. While you were working there you wouldn't have much opportunity to observe the travel through Burkhart Alley? A. Not very much; no. [155

—116]

Q. And couldn't tell just what it was?

(Testimony of C. H. Scheffler.)

A. No; I went through myself.

Q. But you wouldn't usually go through there, going to your work or coming away from your work? A. Not necessarily; no.

Q. Now, I want to get your idea when you say that the travel through Burkhart Alley was the same as the travel through or on B and C. Streets. How many people a day do you think went through there? A. I don't know; I never counted them.

Q. About how often would they go through there?

A. It depends on the business they were on.

Q. What do you base your estimate on?

A. Travel through the alleys there and the different streets and the people you meet—general traffic.

Q. You refer only to foot-passengers? A. Yes.

Q. There was no freighting or teaming through there? A. No.

Q. I can't quite see how you can testify that you used this alley continually when for the greater part of the time you lived in Cordova you were going the longest way around to go home or come to your place of business to go in there?

Mr. DONOHUE.—We object as argumentative.

Objection sustained; defendants allowed an exception.

Witness excused. [156—117]

**Testimony of A. E. Lathrop, in His Own Behalf
(Recalled).**

A. E. LATHROP, one of the plaintiffs, recalled.
(By Mr. DONOHUE.)

Q. Mr. Lathrop, since you were on the stand this

(Testimony of A. E. Lathrop.)

morning have you measured the height from the floor of Burkhart Alley as it passes over Lots 7 and 8 to the roof? A. Yes, sir.

Q. What is the distance from the floor of Burkhart Alley to the roof where it passes over these two lots? A. Twelve feet.

Whereupon court adjourned until to-morrow (Friday) morning at ten o'clock.

Friday, December 12, 1919.

MORNING SESSION.

A. E. LATHROP, continuation of direct examination.

(By Mr. DONOHUE.)

Mr. Lathrop, you are acquainted with J. E. Burkhart? A. Yes, sir.

Q. When did Mr. Burkhart move away from Cordova, about when?

A. I was over at Anchorage when he left here. I imagine it has been possibly four years.

Q. When this case was started did you make an effort to find Mr. Burkhart? A. Yes, sir.

Q. Were you able to find him? A. No, sir.

Q. What was your purpose in finding him—to have his evidence in this case? A. Yes, sir.

Q. Are you a member of the Common Council of the town of Cordova at this time?

A. Yes, sir. [157—118]

Q. How long have you held the office at this time?

A. I was elected to fill a vacancy.

Q. Were you a member of the Council in August

(Testimony of A. E. Lathrop.)

and September of this year? A. Yes, sir.

Q. Did you have a conversation with Mr. Slater, one of the defendants, in regard to Burkhart Alley just a short time before Mr. Slater erected this fence in Burkhart Alley that is described in the complaint? A. I did.

Q. Just state what Mr. Slater said to you in reference to Burkhart Alley in this conversation.

Mr. GRAHAM.—We object to that on the ground that it does not bind the defendant, Bank of Alaska.

The COURT.—The objection will be overruled; it will be received, of course, for the limited purposes heretofore stated.

A. Why, he said he was intending to close the alley, at least for a time, to establish his rights there and he had talked with the balance of the councilmen and they had no objection.

Q. No objection to his closing the alley?

A. They didn't know of any reason why. He wanted to know how I stood and I told him I seriously objected to the closing of the alley.

Q. How many members are there of your Common Council in Cordova? A. There are seven.

Q. Did Slater appear before the Council at a regular meeting of the Council, held a few days before he attempted to close the alley? A. Yes, sir.

Q. What report did he make to the Common Council that was in session at that time? [158—119]

Mr. MEDLEY.—We object to that unless it is understood that it does *that it does* not bind the defendant, the Bank of Alaska.

(Testimony of A. E. Lathrop.)

The COURT.—It is admitted as the Court has indicated for a limited purpose.

A. He said it was his intention to close the alley and he wanted to know where the councilmen stood.

Q. What did he mean by where they stood?

Mr. MEDLEY.— I object to that.

Q. State what he said?

The COURT.—You may state as near as you can what the statement was he made before the council.

A. That was about the gist of it—I don't remember the words. He wanted to appear before the council and have it, I suppose, a matter of record, that he had notified the council, that it was his intention to close the alley.

Q. Did you make any objection at that time?

A. I seriously objected.

Mr. DONOHOE.—That's all.

Cross-examination.

(By Mr. MEDLEY.)

Q. What efforts did you make to find Mr. Burkhardt?

A. Why, spending good hard money in cablegrams.

Q. Did you inquire of any of his former friends in Cordova? A. I certainly did.

Q. Whom did you inquire of?

A. I don't remember now. I can tell you more about this—about three weeks later, after wiring Mr. Burkhardt I received a wire from Mrs. Burkhardt that he was out of the city, but giving no address. I have looked for him.

(Testimony of A. E. Lathrop.)

Q. Did you wire to Mr. Burkhart? [159—120]

A. Yes, sir, I wired to Mr. Burkhart.

Q. And that is the wire that Mrs. Burkhart replied to? A. I suppose so—it must have been.

Q. You had an address on that wire, didn't you?

A. I had an address; yes, sir.

Q. Then you must have known by receiving an answer that that wire was delivered?

A. I said about three weeks afterwards I received a wire from Mrs. Burkhart stating that Mr. Burkhart was out of the city, but gave me no address.

Q. Where did you get the address you put on that original wire?

A. I don't remember; I got it from somebody in town. I knew Mr. Burkhart was living in Seattle because I had met him there just a short time before.

Q. Do you know who Mr. Burkhart's intimate friends were in Cordova when he lived here?

A. No, I do not know that I know who Mr. Burkhart's intimate friends were.

Q. You don't know who he associated with when he was in Cordova? A. I don't remember; no.

Q. Did you inquire of Mr. Ashland where Mr. Burkhart lived? A. Mr. Ashland was not here.

Q. You knew where Mr. Ashland was, didn't you?

A. No. I did not know where Mr. Ashland was.

Q. You know he bought that property from Burkhart?

A. Yes, I know he bought that property from Burkhart.

(Testimony of A. E. Lathrop.)

Q. And if you wanted to find Mr. Burkhart, Mr. Ashland would probably be able to tell you where he was?

A. Mr. Ashland isn't in Seattle; I don't know where he is.

Q. You didn't make any effort to find Mr. Ashland? [160—121]

A. Not Mr. Ashland; no.

Q. Did you know that Mr. Burkhart was a member of any of the fraternal orders in Cordova?

A. No, sir.

Q. You didn't know that? A. No, sir.

Witness excused. [161—122]

Mr. DONOHOE.—I will now offer the deposition of David McDonald, taken in pursuance to stipulation, which I will ask Mr. Dimond to read.

Mr. DIMOND reads as follows:

In the District Court for the Territory of Alaska,
Third Division.

No. C-173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Corporation,

Defendants.

Stipulation Re Deposition of David McDonald.

It is hereby stipulated and agreed by and between the parties plaintiff and defendant in the above-

entitled action, by and through their respective attorneys of record that the deposition of Dave McDonald, a witness on behalf of plaintiffs, may be taken upon oral, direct and cross interrogatories to be propounded to said witness at the time of taking said deposition; that said deposition may be taken before R. H. L. Noaks, a notary public in and for the Territory of Alaska, at his office in the town of Cordova, at the hour of 2 o'clock in the afternoon of the 4th day of October, 1919.

It is further stipulated that said deposition when taken and reduced to writing and certified to by said notary and filed in court may be read by either party in evidence at the trial of the above entitled cause or any retrial thereof, with the same force and effect as if said witness appeared at said trial in person and orally testified.

It is further stipulated that should the steamship "Alameda" depart from the Port of Cordova before the deposition of said witness is transcribed and the said witness has an opportunity to read and sign the same, then and in that event the signature of said witness [162—123] to said deposition is hereby waived.

It is further stipulated that each of the parties reserve all legal objection to the testimony given by said witness, save and except as to the form of the interrogatories or cross-interrogatories and may interpose any and all legal objections to said testimony at the time the same is offered in evidence, whether said objections appear from said deposition

to have been made at the time of the taking of the same or not.

It is further stipulated and agreed that all objections as to the manner of certifying said deposition and transmitting the same to the clerk of the Court are hereby waived, so long as it appears from said deposition and the certificate of the notary attached hereto that the witness was duly sworn before testifying and that the testimony contained in said deposition was given by said witness at the time and place mentioned in this stipulation.

Dated at Cordova, Alaska, this 3d day of October, 1919.

DONOHOE & DIMOND,
By T. J. DONOHOE,
Attorneys for Plaintiff.
EDWARD F. MEDLEY,
B. O. GRAHAM,
Attorneys for Defendant.

Pursuant to the herewith stipulation, there appeared before me, R. H. L. Noaks, a notary public in and for the territory of Alaska, at my office in the town of Cordova, at two o'clock in the afternoon of the 4th day of October, 1919, DAVID McDONALD, a witness on behalf of plaintiffs, also T. J. Donohoe, one of the attorneys for plaintiffs, Messrs. B. O. Graham and Edward F. Medley, attorneys for defendants, said witness being first duly sworn before me to tell the truth, the whole truth and nothing but the truth, testified, as follows: [163—124]

Deposition of David McDonald, for Plaintiffs.

(Examination by Mr. DONOHUE.)

Q. State your name.

A. David McDonald.

Q. Where do you reside?

A. Seattle, Washington, now.

Q. Did you ever reside in the town of Cordova?

A. I have.

Q. When did you first live in the town of Cordova? A. 1908.

Q. What was your business at that time?

A. Merchant.

Q. Were you associated with or in partnership with any other person? A. Yes; John Reidy.

Q. You and Mr. Reidy were running a general merchandise store under the firm name of McDonald & Reidy. A. Yes.

Q. Where was that store situated?

A. On Second Street.

Q. Was it on the premises now occupied by the U. S. Jail? A. Yes.

Q. When did you put up your building on these premises? A. In the summer of 1908.

Q. That building where you were running your store in 1908 is on the easterly side of Second Street opposite what is now known as Burkhart Alley?

A. Yes.

Q. Were you acquainted with M. Finkelstein?

A. Yes.

Q. Was Mr. Finkelstein engaged in any business in the summer and fall of 1908? [164—125]

(Deposition of David McDonald.)

A. Yes.

Q. What? A. General clothing-store.

Q. Where was his business located?

A. Second Street.

Q. Where was it in respect to Burkhart Alley?

A. Right on the alley.

Q. Was it facing abutting on Second Street on the westerly side and lying on the northerly side of Burkhart Alley? A. Yes.

Q. That is what is known as lot 26, block 7, of the town of Cordova?

A. I am not sure till I look at the plat.

Q. Did Mr. Finkelstein put up a building in the fall of 1908 on this property? A. Yes.

Q. How long did he conduct business at this point, as you remember, about?

A. I think about a year.

Q. Do you know what part of the town he moved to? A. He moved to First Avenue.

Q. Were you in the town of Cordova at the time Mr. Finkelstein put up this building in lot 26 in the town of Cordova? A. On Second Street?

Q. Yes. A. I was.

Q. Do you know, in the construction of that building, whether or not Mr. Finkelstein left a space of 4 feet along the southerly side of lot 26 in block 7, which forms a part of Burkhart Alley?

A. Yes.

Q. Are you acquainted with Robert Ashland?
[165—126]

A. Yes.

(Deposition of David McDonald.)

Q. How long have you known Robert Ashland?

A. Since 1908.

Q. Do you know whether or not in 1908 Robert Ashland was the owner of lot 7 in block 7 of the town of Cordova? A. On First Street?

Q. Yes, on First Street.

A. Yes, he was the owner of that lot.

Q. Do you know when Robert Ashland constructed a building on lot 7, block 7, of the town of Cordova?

A. In the summer and fall of 1908.

Q. Do you know whether Robert Ashland, when he constructed this building on lot 7 or block 7 of the town of Cordova, left any space along the southerly side line of said lot? A. Yes.

Q. Do you know how wide that space was?

A. Four feet.

Q. What was that 4 feet used for, if you know?

A. Used as an alleyway.

Q. Is that part of what is known as Burkhart Alley? A. Yes.

Q. Were you acquainted with A. E. Burkhart?

A. Yes.

Q. When did you first know Mr. Burkhart?

A. In 1908.

Q. Do you know if Mr. Burkhart erected a building on lot 8 of block 7 of the town of Cordova?

A. Yes.

Q. When was that building erected?

A. About the same time, as I can remember.

Q. About the same time that the Ashland building was erected? [166—127]

(Deposition of David McDonald.)

A. Yes.

Q. Do you know if Mr. Burkhart, when he erected this building on lot 8 of block 7 of the town of Cordova, whether he left a strip of ground along the northerly side of this lot that was not covered by the building? A. Yes.

Q. How wide was that strip of ground?

A. Four feet.

Q. And what was that strip used for?

A. An alleyway.

Q. Did that strip of ground, four feet wide of the northerly side of lot 8, block 7, form part of what is known as Burkhart Alley? A. Yes.

Q. Did you know of A. E. Burkhart owning lot 25 in block 7, which is the lot facing on Second Avenue along the southerly side of Burkhart Alley?

A. Yes, he owned half interest.

Q. Do you remember who owned the other half interest, in the fall of 1908?

A. A man by the name of Barber.

Q. Do you know of Burkhart and Barber putting up the building on lot 25 in block 7 of the town of Cordova? A. Joining the alleyway?

Q. Yes, on the southerly side of the alley.

A. Yes.

Q. Have you had occasion within the past week to pass through Burkhart Alley from Second Street to First Street? A. Yes.

Q. I call your attention to the building on lot 25 in block 7 [167—128] and ask you if the high walks along the northerly side of that building are now the

(Deposition of David McDonald.)

same as they were when the alley was first opened up in 1908? A. Yes, they are the same.

Q. The same porch running along the side of the building as they were when the alley was opened up in 1908? A. Yes, exactly the same.

Q. How long did you do business from summer of 1908 at your location on Second Avenue in the town of Cordova? A. Until 1910.

Q. In 1910; then where did you move your mercantile business? A. To First Avenue.

Q. What lot? A. Lot 7, block 7.

Q. In block 7? A. Lot 7, block 7.

Q. That is where the Northern Drug Company now is? A. Yes.

Q. What is now known as the Slater property?

A. Yes.

Q. How long did you do business at this new location on First Avenue, on lot 7 in block 7?

A. For two years, to 1912, in March.

Q. March, 1912. Now, you were in business from the summer of 1908 until March, 1912, in the town of Cordova, were you? A. Yes.

Q. Had you occasion to observe the amount of public travel over and through Burkhart Alley during those four years from Second Street to First Street and from First Street back to Second Street?

A. Yes.

Q. What was the relative amount of travel that passed through and [168—129] over Burkhart Alley, as compared with the travel that passed along B and C Streets between First Avenue and Second

(Deposition of David McDonald.)

Avenue, of the town of Cordova, during that period.

A. There was a greater amount of travel, at all times, through Burkhart Alley.

Q. A greater amount of travel through the alley than that of B or C Street? A. Yes.

Q. Did you in the year 1910 purchase from Ashland lot 7 in Block 7, town of Cordova?

A. Yes, where the Northern Drug Company is now.

Q. Did you, previous to purchasing this property from Ashland, have any conversation regarding the alley, and with A. E. Burkhart, regarding Burkhart Alley? A. I did; yes.

Q. This conversation was had while Ashland was still owner of lot 7 in block 7 of the town of Cordova?

A. Yes.

Q. And at the time of this conversation Burkhart was the owner of Lot 8 in Block 7 of the town of Cordova? A. Part owner.

Q. Who owned the other part? A. Barber.

Q. Now, just state that conversation that you had with Ashland and Burkhart in regard to the Burkhart Alley some time in the year of 1910 and previous to your purchase of lot 7 in block 7 from Ashland?

Mr. GRAHAM.—We object to that question on the ground that it is incompetent, irrelevant and immaterial.

Objection overruled; defendants allowed an exception. [169—130]

A. It was nothing more than that it was an advantage to the business.

Q. Was there anything said by either of these men,

(Deposition of David McDonald.)

in that conversation, as to whether the alley was a public thoroughfare and would remain open?

Mr. GRAHAM.—We make the same objection.

Mr. MEDLEY.—We object to the form of that question.

Mr. DIMOND.—The question is not answered.

Q. What, if anything, was said by Ashland or Burkhart or both of them at the time you had these conversations, as to whether Burkhart Alley was a public thoroughfare and would remain open as a public thoroughfare?

Mr. GRAHAM.—We make the same objection.

Objection overruled; defendants allowed an exception.

A. There was nothing like that.

Q. Do you remember anything else said at that time by Ashland or Burkhart regarding the Burkhart Alley? A. No.

Q. At the time you had these conversations and at the time you purchased lot 7 in block 7 was there any discussion as to the advantage of having Burkhart Alley open as a Public thoroughfare?

Mr. MEDLEY.—I object to the form of that question.

Mr. DONOHOE.—I will let the objection stand.

Objection overruled; defendants allowed an exception.

A. It was an advantage to the business to have it remain open.

Q. Did you take the fact that Burkhart Alley was open to public travel into consideration in purchasing

(Deposition of David McDonald.)

lot 7 in block 7? A. Yes.

Q. How long did you remain in business conducting a general merchandise store on lot 7 in block 7 of the town of Cordova? [170—131]

A. About two years.

Q. About two years. During that time was Burkhart Alley used as a public thoroughfare by the traveling public of Cordova? A. Yes.

Q. Did you, after purchasing lot 7 in block 7 and opening up your general merchandise store there make any change in the south wall of your building, being that wall along the northerly side of Burkhart Alley? A. Yes.

Q. What changes did you make and for what purpose?

A. We moved the door from the corner and put in thirty feet of plate glass along the alleyway.

Q. What was the purpose of putting this plate glass along the alleyway?

A. For display windows.

Q. Was there a considerable amount of travel back and forth along the alley, enough to make you put this plate glass along the alleyway? A. Yes.

Q. During the time that you were in business on lot seven in block seven in the town of Cordova did you have rooms in the upstairs of your building?

A. Yes.

Q. Where was the entrance to the upstairs to these rooms?

A. From the alleyway of Burkhart Alley.

Q. Was there any other means by which your

(Deposition of David McDonald.)

roomers could reach the rooms in the upstairs of the building except through Burkhart Alley?

A. No. They could go through the store, but then the store was locked up after six o'clock. [171—132]

Q. Now, at the time you were doing business on First Avenue on lot 7, block 7, did you have a warehouse at your old store on Second Avenue?

A. Yes.

Q. How did you travel between your store on First Avenue and your warehouse on Second Avenue?

A. Through the alley.

Q. Through Burkhart Alley. You were familiar with the situation of the building that Burkhart had on lot 8 in block 7 for the four years you lived in Cordova? A. Yes.

Q. What business was conducted in the rear portion of the Burkhart Building on lot 8 in Block 7 during the four years you were in Cordova, commencing with the fall of 1908 and extending to the spring of 1912? A. A restaurant, as I remember.

Q. Where was the entrance to this restaurant?

A. From First Avenue and from the alley.

Q. By what means did you reach the entrance from Second Avenue? A. Through Burkhart Alley.

Q. Then, as I understand, customers of this restaurant on First Avenue had to come through Burkhart Alley to the entrance to the restaurant? A. Yes.

Q. And customers from Second Avenue came through Burkhart Alley to the entrance of the restaurant? A. Yes.

Q. Were there any other entrances by which the

(Deposition of David McDonald.)

customers entered this restaurant? A. No.

Q. Did you, at any time, while you were the owner or half-owner of [172—133] lot 7 in block 7 ever claim or exercise any right of ownership over the four-foot strip off the southerly side of this lot?

A. Yes.

Q. I mean by this, the four-foot strip used as a portion of Burkhart Alley? A. Yes.

Q. In what manner?

A. We always kept it repaired for the travelers to go through.

Q. Just the same as you kept up the sidewalks?

A. Yes.

Q. That was the only actual ownership you exercised over it? A. That was all.

Q. Do you know if Burkhart as the owner of lot 8 in block 7 of the town of Cordova, during the time you lived in Cordova, ever objected to the public traveling upon and over this alley? A. No.

Mr. MEDLEY.—We object to that question.

Mr. MEDLEY.—I move the question and answer be stricken as heresay evidence.

Objection overruled and motion denied; defendants allowed an exception to the ruling.

Q. Did you during the time you were the owner of lot 7 in block 7 ever in any manner attempt to stop the public from using Burkhart Alley as a public thoroughfare? A. No.

Q. Did you ever hear of any owner of property along this alley ever attempting to stop people from using it as a public thoroughfare? A. No.

(Deposition of David McDonald.)

Mr. MEDLEY.—I object to that question as matter irrelevant and [173—134] incompetent.

Mr. MEDLEY.—I move the question and answer be stricken.

Objection overruled and motion denied; defendants allowed an exception to the ruling.

Cross-examination.

(By Mr. EDWARD F. MEDLEY.)

Q. Mr. McDonald, I understand you erected a building on Second Avenue in 1908 and moved to what is now known as the Slater building on lot 7 in block 7 in 1910, and remained there in a general merchandise business until 1912. During all those four years was the general situation as to the buildings erected on Second Avenue between B and C Streets the same as they are now? A. Yes.

Q. Was there at that time, or during those four years, any residence buildings on Second Avenue outside of what there are now between B and C Streets?

A. Just about the same, except this building here (Office of Donohoe & Dimond).

Q. You stated, that in your opinion, during the four years that you were in business in Cordova, 1908 to 1912, that there was greater traffic through the alleyway than on B or C Streets. You are familiar with what is known as B and C Streets? A. Yes.

Q. How do you account for that, Mr. McDonald?

A. Well, as far as I could see, I was positive that there was more travel in that alley than either of the other streets.

Q. Did your business keep you fairly well confined

(Deposition of David McDonald.)

on the premises where you were then located?

A. Not all the time.

Q. How many hours each day did you spend at your store? [174—135]

A. Probably seven or eight.

Q. How many hours did you spend in the vicinity of B Street? A. Very few.

Q. How many hours every day did you spend in the vicinity of C Street?

A. About the same; very few.

Q. Then your facilities for observing travel on Burkhart Alley were better than they were for B and C Streets? A. Yes.

Q. Isn't it a fact, Mr. McDonald, that the travel that you saw most in the alley was of people who lived in the alley, or in Burkhart Flats, or who had business with those in this district and with those who lived or had business with the people who roomed above your store on lot 7 in block 7? A. No.

Q. It was not; where was this travel going?

A. To the Postoffice.

Q. Where was the Postoffice?

A. Second Avenue.

Q. In what building?

A. In the Ostrander Building.

Q. Did you pay taxes on lot 7 in block 7 when you were the owner of it? A. Yes.

Q. Do you know how that lot was assessed?

A. I could not say now.

Q. Do you know whether they included that four feet or not? A. It included the four feet.

(Deposition of David McDonald.)

Q. The taxes included the four feet off the south-
erly side of lot 7? A. Yes. [175—136]

Q. You were assessed, were you not, for the full
25 feet of that lot when you were the owner of it?

A. Yes.

Q. When you purchased the lot 7 in block 7 from
Robert Ashland did you purchase the whole lot, the
full 25 feet, or was there a reservation taken off from
it for the four feet?

A. We purchased lot 7 in block 7.

Q. Who did you sell lot 7 in block 7 to?

A. To O'Neill and Slater.

Q. In the deed conveying your interest to O'Neill
and Slater, did you convey the whole of lot 7 in block
7, or did you give a reservation, excepting the four
feet off the southerly side of lot 7?

A. Conveyed the whole of lot 7.

Q. What interest in lot 7, block 7, did you convey
to O'Neill and Slater? A. Half interest.

Q. An undivided half interest? A. Yes.

Q. Now, Mr. McDonald, in the direct examination
you testified that when the building on lot 7, block 7,
was erected, they left a space four feet off the south-
erly side of said lot and when the building on lot 8
was erected, they left a space on the northerly side
of said lot 8. Isn't it a fact that no space was left
between the upper floors of these buildings?

A. Yes.

Q. That is, when those buildings were erected in
the summer and fall of 1908, the buildings on the sec-
ond floors were extended out and met on the lot lines?

(Deposition of David McDonald.)

A. Yes. [176—137]

Q. And there was no space between the buildings on lots 7 and 8 in block 7, as far as the second story or upper floors of said buildings were concerned?

A. No space.

Q. I call your attention to the sidewalk in front of Burkhart Alley on First Street. Who kept that part of the sidewalk in repairs, not the part in front of your lot, but the sidewalk in front of the alley?

A. We kept one-half and Burkhart kept his.

Q. You repaired your four foot end of it and Burkhart repaired his four feet of it. A. Yes.

Q. When you were the owner of lot 7 in block 7 did you occupy or use the upper portion of said building?

A. Yes.

Q. Did your rooms all use the whole 25 feet of the lot in width?

A. Yes, that is 24 feet, I think the building is 24 feet in width.

Q. From which side of the lot is the one-foot taken from? A. The northerly side.

Q. During the four years that you were familiar with lot 8 in block 7 Mr. Burkhart used the full width of said lot 8, as far as the upper story was concerned?

A. Yes.

Q. Within the past few days, have you had an occasion to observe the situation of the buildings on lots 7 and 8 in block 7? A. Yes.

Q. Is the situation, to-day, as to those buildings the same as it was when they were erected in 1908?

A. Yes. [177—138]

(Deposition of David McDonald.)

Redirect Examination.

(By T. J. DONOHOE.)

Q. You have answered, Mr. McDonald, that you paid taxes on the full 25 feet of lot 7 in block 7, while you were part owner of it. I will ask you if your assessment specified in feet or just said lot 7 in block 7? A. Lot 7, block 7.

Q. And there was no designated number of feet on which you were paying taxes? A. No.

Q. Do you remember what your taxes were on that lot while you were there?

A. I could not say.

Q. You sold your half interest in lot 7 to O'Neill and Slater, did you not? A. Yes.

Q. That was, as I understand you to say, in March, 1912? A. Yes.

(Signed) DAVE McDONALD.

United States of America,
Territory of Alaska,—ss.

I, R. H. L. Noaks, a notary public in and for the Territory of Alaska, do hereby certify that the witness named in the foregoing deposition, to wit, David McDonald, was by me first duly sworn to tell the truth, the whole truth and nothing but the truth, before his deposition was taken.

That said deposition was then taken at the time and place mentioned in the annexed stipulation, to wit, at my office in the town of Cordova, Territory of Alaska, on the fourth day of October, A. D. 1919, between the hours of two o'clock P. M. and four o'clock P. M. of that day. [178—139]

That said deposition was taken in shorthand by Frank Burns and reduced by him to typewriting and when completed was by me carefully read to said witness and being corrected by said witness was by him subscribed and sworn to in my office.

That the foregoing depositions contains a full, true and correct transcript of the testimony of said witness given at the time of taking said deposition.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal this 8th day of October, A. D. 1919.

[Notarial Seal]

R. H. L. NOAKS,
Notary Public in and for the Territory of Alaska.

My Commission expires on the — day of —, —.

Mr. DONOHUE.—We would like to make the request or suggestion before we rest that before the completion of the trial of this case, if your Honor is not personally familiar with the Burkhart Alley, you inspect it for your own information.

The COURT.—I have been going through there more or less since 1909 and have taken occasion to observe it very carefully the last few days, the sidewalk, openings, etc. However, I shall be glad to look at it again.

PLAINTIFFS REST. [179—140]

Mr. GRAHAM.—The defendants move that this case be dismissed on the ground that the plaintiffs have failed to establish a cause of action, in that it has not been shown that the usage by the public

was adverse or hostile to the dominion over the property by the property owners, and the testimony in the case being entirely consistent with the theory of a permissive use or a use by sufferance and allowance of the defendants and their predecessors in interest. Further, that neither the plaintiff, A. E. Lathrop, nor the plaintiff, Alice Johnson, have shown that they have been damaged in kind or character different from the damage sustained by other property owners in the vicinity or by the public in general and therefore cannot maintain an action to restrain or prohibit a public nuisance.

After argument by the respective attorneys—

By the COURT.—I rather hesitate to rule on the motion without the opportunity to give it more consideration. At the same time I realize that you ought to receive a ruling on the motion before taking further evidence, unless you are disposed not to urge a ruling on this motion at this time. The Court will consider the matter and take it under advisement, but in view of the fact that we will probably have to leave here in a few days, it seems to me that the best way will be to receive all the evidence in the case in order to expedite matters, as I cannot return here to receive further evidence. I will hear counsel on that feature of the case.

Mr. GRAHAM.—I think your Honor ought to have fully opportunity to examine the authorities, and I think, although it is a little irregular, we ought not to complain of it.

The COURT.—We will proceed, then, with the

case and the Court will [180—141] reserve its ruling on this motion.

Mr. DONOHOE.—That is satisfactory.

Mr. GRAHAM.—It is satisfactory to us. I will call Mr. Ives.

DEFENSE.

Testimony of H. A. Ives, for Defendants.

H. A. IVES, a witness called and sworn in behalf of the defendants, testified as follows:

Direct Examination.

(By Mr. GRAHAM.)

Q. State your name and residence.

A. H. A. Ives; Cordova.

Q. What is your business? A. Photographer.

Q. How long have you been in the business of photography?

A. I have not been in the business steady—I started in about 1912.

Q. I call your attention to a photograph marked for identification Defendants' Exhibit One—do you recognize that photograph? A. I do.

Q. Did you take that picture? A. I did.

Q. From the negative?

A. From the negative.

Q. When?

A. On the fourth day of December.

Q. What does it represent?

A. It represents the front, the First Street entrance to the Burkhart Alley. [181—142]

Q. Showing the buildings on both sides of the

(Testimony of H. A. Ives.)

opening on the alley? A. Yes, sir.

Q. You printed these pictures yourself from the negatives? A. I did the work.

Q. There was no alteration or changes made in the negative? A. No, sir.

Mr. GRAHAM.—We offer this photograph in evidence.

Mr. DONOHUE.—We have no objection, reserving the right to cross-examine the witness regarding it.

The photograph is admitted as Defendants' Exhibit One, is attached hereto and made a part hereof.

Q. I call your attention to Defendants' Exhibit #2 for Identification. Do you recognize that picture? A. I do.

Q. Did you take that picture? A. I did.

Q. When? A. On the 4th of December.

Q. What does it represent?

A. It represents the rear entrance or rather the center of Burkhart Alley; it is taken over in front of the Burkhart Flats.

Q. It represents the rear of the buildings on Lot 7 and 8, Block 7? A. Yes, sir.

Q. Was that picture printed from the negative by yourself? A. It was.

Q. Without any change or alteration in the negative? A. Yes, sir.

Mr. GRAHAM.—We offer it in evidence.

It is admitted, without objection, marked De-

(Testimony of H. A. Ives.)

fendants' Exhibit Two, is attached hereto and made a part hereof.

Mr. GRAHAM.—That is all. [182—143]

Cross-examination.

(By Mr. DONOHOE.)

Q. Mr. Ives, what is this white streak shown in the alleyway, on Defendants' Exhibit One?

A. That is the sidewalk line from the outside of the building at the rear, showing entirely through the building.

Q. Then that white streak as shown in the alleyway extends through the Burkhart Alley from the rear end of the buildings on Lots 7 and 8?

A. Yes.

Q. From what position was that picture taken?

A. Directly in front of the building on the other sidewalk, the opposite sidewalk.

Q. The opposite sidewalk—from acrossed the street? A. Yes, sir.

Q. What time of the day was that taken?

A. It was just about 2:30 in the afternoon.

Q. It was 100 feet from the westerly end of the snow as shown on this picture, Defendants' Exhibit One—from there up to the sidewalk of First Street? A. I don't know the exact distance.

Q. This snow stops, the snow shown in the alleyway, stops at the intersection of the Burkhart Alley with the regular alley running north and south?

A. Yes.

Q. Calling your attention to Defendants' Exhibit Two, I will ask you to state if the show window

(Testimony of H. A. Ives.)

shown in this picture is the window on the west side of First Avenue? A. Yes, sir.

Q. And it is acrossed the street from the westerly terminal of Burkhart Alley? A. It is.

Witness excused. [183—144]

Mr. MEDLEY.—Defendant offers in evidence Defendants' Exhibit No. Three, a diagram which Mr. Donohoe has been given a blue-print of and which he says he will not object to, for the purpose of showing the side entrance into buildings on Lots 7 and 8 on Block 7; it was made by Mr. Hesse.

Mr. DONOHOE.—We have no objection to it being introduced for the purpose stated by counsel.

The diagram is admitted in evidence, marked Defendants' Exhibit 3; is attached hereto and made a part hereof.

Mr. MEDLEY.—I now desire to introduce in evidence certain maps—they are copies of public records certified by the custodian of the records, the United States Commissioner for this district; I introduce them under that section of the statute which makes a certified copy of a public record admissible in evidence. I first offer original plat of the town of Cordova, filed on the 22d day of May, 1908, and certified to by R. H. L. Noaks, U. S. Commissioner for this precinct.

Mr. DONOHOE.—No objection.

The plat is admitted in evidence, marked Defendants' Exhibit #4; is attached hereto and made a part hereof.

Mr. MEDLEY.—I next offer a map of Cordova,

filed for record August 31, 1911, certified by the U. S. Commissioner for this precinct; on the map is this notation: This map is amendatory of and supplemental to the original plat of the town of Cordova, recorded in the office of the Recorder for the Cordova precinct, at page 10, Book One, of Plats.

Mr. DONOHOE.—We object to the introduction of this map in evidence on the ground that while it may be of record, there is no evidence of the authority under which it was made and that it represents an actual survey. The purpose of the objection is this: The map [184—145] just admitted in evidence as Exhibit #4 was the map made of the town of Cordova in May, 1908. This present map, the one now offered, takes in a larger territory of land than that map and is a redrawing of that map. If counsel is willing to stipulate that Block 7 as shown on this map is shown as it existed in May, 1908, I have no objection to the map, but if it does not, it is a recopy of that 1908 map and not made from a survey.

The COURT.—Do you agree to the stipulation suggested?

Mr. MEDLEY.—No, we offer the map under the statute, as a certified copy of the public record.

The COURT.—What is the purpose of the offer?

Mr. MEDLEY.—It is twofold. The map purports to show on its face the streets and alleys of Cordova at the time of its being made up and a stipulation I have here and which I intend to in-

roduce has reference to that map, because it refers to deeds according to the plat of the town of Cordova, filed and recorded in Book One of Plats, at page 11, and it supplements and completes this stipulation. The description in these deeds, which it is stipulated shall be admitted, cannot be understood unless we file the map to show what it refers to.

Mr. DONOHOE.—I will state to the Court, when that first map was filed, it was filed for the purpose as shown on its face to prepare streets and alleys for dedication. When the second map was filed there was then a city government in the town, before the dedication was made by Mr. Hazelet, trustee. The intervening time, between the time of the filing of those two maps, the town had established itself as a legal entity and corporation.

The COURT.—Is there an attempt to show by this map which is now offered that on August 31, 1911, there was no opening through there? [185—146]

Mr. MEDLEY.—No, we admit that opening was there—we couldn't attempt to deny that.

The COURT.—I don't see that it makes any particular difference—it may be admitted on the statement of counsel as Defendants' Exhibit #5.

To which ruling of the Court counsel for plaintiffs is allowed an exception.

The map is admitted in evidence, marked Defendants' Exhibit No. 5; is attached hereto and made a part hereof.

Mr. MEDLEY.—I now offer this stipulation dated December 8, 1919.

The stipulation is admitted in evidence, without objection, marked Defendants' Exhibit No. 6, and reads as follows:

Defendants' Exhibit No. 6.

In the District Court for the Territory of Alaska,
Third Division.

No. C-173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,

Defendants.

STIPULATION.

It is hereby stipulated and agreed by and between plaintiffs and defendants, by Messrs. Donohoe & Dimond, attorneys for plaintiffs, and by Edward F. Medley, Esq., and B. O. Graham, Esq., attorneys for defendants, that the following described conveyances of, and instruments affecting the title to, part or all, as the case may be, of the lots in Block Seven (7) of the town of Cordova, Alaska, which are referred to in the pleadings in the above-entitled cause, were made by the respective parties hereinafter named as grantors to the respective grantees hereinafter named, on the respective dates

hereinafter specified, filed for record and recorded as and when hereinafter respectively specified and that such conveyances and other instruments [186—147] described the lot or lots in said block respectively affected thereby, in the manner hereinafter stated, to wit:

Warranty Deed, Copper River Railway Company to H. B. Burkhart, dated October 1st, 1908, filed for record December 8th, 1908, recorded in Book 2 of Deeds at page 148. Description: Lot twenty-five (25) in Block number seven (7) of the Town of Cordova, according to the plat of the Town of Cordova recorded in Book 1 at page 10.

Warranty Deed, H. B. Burkhart, to A. E. Burkhart, dated December 3d, 1908, filed for record December 8th, 1908, recorded in Book 2 of Deeds at page 150. Description: An undivided half interest in Lot twenty-five (25) in Block seven (7), as laid out and platted from United States Survey No. 449, which plat is recorded in the Cordova Recording Precinct or District.

Warranty Deed, H. B. Burkhart to A. H. Barber, dated December 3d, 1908, filed for record June 29th, 1909, recorded in Book 3 of Deeds at page 93. Description: On undivided one-half interest in lot twenty-five (25) in block seven (7) as laid out and platted from United States Survey No. 449.

Mortgage, A. H. Barber and wife to S. Blum & Company, dated December 13th, 1909, filed for record December 13th, 1909, recorded in Book 1 of Mortgages at page 178. Description: An undivided one-half interest in Lots eight (8) and

twenty-five (25) in Block number seven (7) of the Town of Cordova, according to the plat of the Town of Cordova recorded in Book 1 at page 10.

Mortgage, H. B. Burkhart to A. E. Burkhart, dated June 28th, 1910, filed for record June 28th, 1910, recorded in Book 1 of Mortgages at page 209. Description: An undivided one-half interest in Lots eight (8) and twenty-five (25) in Block number seven (7) as the same appears on the recorded official plat of said town.

Deed, Abraham H. Barber and wife to Robert Ashland, dated October 16th, 1913, filed for record May 29th, 1914, recorded in Book 2 of General Records at page 68. Description: Lots eight (8) and twenty-five (25) in Block number seven (7) in the Town of Cordova as laid out and platted from United States Survey No. 449.

Quitclaim deed, Robert Ashland to Maud Ashland, dated August 31st, 1914, filed for record September 5th, 1914, recorded in Book 2 of General Records at page 94. Description: Undivided one-half interest in Lot twenty-five (25) in Block seven (7). All these lots of the Town of Cordova, as laid out and platted from United States Survey No. 449. [187—148]

Warranty deed, H. B. Burkhart and wife to Robert Ashland, dated July 1st, 1917, filed for record August 7th, 1917, recorded in Book 3 of General Records at page 287. Description: Undivided one-half interest in lots eight (8) and twenty-five (25) in Block number seven (7), as laid out and platted from United States Survey No. 449, which

is recorded in Cordova Recording District, Alaska.

Quitclaim deed, Robert Ashland to Maud Ashland, dated January 16th, 1919, filed for record February 1st, 1919, recorded in Book 4 of General Records at page 250. Description: All interest in lot twenty-five (25) in Block number seven (7) of the Town of Cordova, Alaska, as laid out and platted from United States Survey No. 449, which plat is recorded in Cordova Recording Precinct, Territory of Alaska.

Land Contract, George C. Hazelet, Trustee, to Robert Ashland, dated June 12th, 1908, filed for record June 12th, 1908, recorded in Book 1 of Deeds at page 330. Description: Lot seven (7) in Block number seven (7), according to the plat of the Town of Cordova, recorded in Book 1 at page 10.

Warranty Deed, George C. Hazelet, Trustee, to Robert Ashland, dated June 16th, 1909, filed for record September 25th, 1909, recorded in Book 4 of Deeds at page 65. Description: Lot seven (7) in Block number seven (7), United States Survey No. 449, of records of Cordova Recording Precinct, Alaska.

Warrant Deed, Robert Ashland to Maud Ashland, dated September 16th, 1909, filed for record September 25th, 1909, recorded in Book 4 of Deeds at page 69. Description: Lot seven (7) in Block number seven (7), within the Cordova Recording Precinct and being part of the United States Survey No. 449.

Deed, Robert Ashland to Maud Ashland, dated March 4th, 1909, filed for record March 4th, 1909,

recorded in Book 3 of Deeds at page 30. Description: Lot Seven (7) of Block number seven (7) of the Townsite of Cordova.

Mortgage, Robert Ashland and wife to S. Blum & Company, dated November 1st, 1910, filed for record November 12th, 1910, recorded in Book 1 of Mortgages at page 219. Description: Lot seven (7) of Block number seven (7) and Lot nine (9) of Block number eighteen (18), according to the plat of the Town of Cordova, recorded in Book 1 at page 10.

Warrant Deed, Maud Ashland and husband to David A. McDonald and John Reidy, dated November 15th, 1910, filed for record January 2nd, 1911, recorded in Book 4 of Deeds at page 149. Description: Lot seven (7) in Block number seven (7) of the town and plat of Cordova, Alaska, and being part of the United States Survey 449.

Mortgage, David A. McDonald and John Reidy to Maud Ashland, dated December 31st, 1910, filed for record January 2nd, 1911, recorded in Book 1 of Mortgages at page 229. Description: Lot seven (7) in Block number seven (7) of the Town and plat of Cordova, Alaska, being a part of United States Survey No. 449. [188—149]

Warranty Deed, David A. McDonald to H. A. Slater and H. I. O'Neill, dated March 9th, 1913, filed for record October 3d, 1913, recorded in Book 1 of General Records at page 363. Description: Lot seven (7) in Block number seven (7), an undivided one-half interest, as shown upon the official plat

in the records thereof in the Recorder's office of the Precinct of Cordova, District of Alaska.

Land Contract, George C. Hazelet, Trustee to A. E. Burkhart, dated June 4th, 1908, filed for record June 4th, 1908, recorded in Book 1 of Deeds at page 310. Description: Lot eight (8) in Block number seven (7) as shown upon the official plat in the records thereof in the Recorder's office of the Town of Cordova, recorded in Book 1 at page 10.

Warranty Deed, George C. Hazelet, Trustee, to A. E. Burkhart, dated July 12th, 1909, filed for record September 20th, 1909, recorded in Book 4 of Deeds at page 63. Description: Lot eight (8) in Block number seven (7), according to the plat of the Town of Cordova, recorded in Book 1 at page 10.

Warranty Deed, A. E. Burkhart to A. H. Barber, dated December 3d, 1908, filed for record June 29th, 1909, recorded in Book 3 of Deeds at page 95. Description: Undivided one-half interest in Lot eight (8) in Block number seven (7), of the new Town of Cordova as laid out and platted from United States Survey No. 449, which is recorded in Cordova Recording District, Alaska.

Mortgage, A. H. Barber and wife to S. Blum & Company, dated December 13th, 1909, filed for record December 13th, 1909, recorded in Book 1 of Mortgages at page 178. Description: Undivided one-half interest in Lots eight (8) and twenty-five (25), in Block number seven (7), according to the plat of the Town of Cordova, recorded in Book 1 at page 10.

Mortgage, H. B. Burkhart and A. E. Burkhart

to S. Blum & Company, dated June 28th, 1910, filed for record June 28th, 1910, recorded in Book 1 of Mortgages at page 209. Description: Undivided one-half interest in Lots eight (8) and twenty-five (25), in Block number (7), as the same appears on the recorded official plat of said town.

Deed, Abraham H. Barber and wife to Robert Ashland, dated October 16th, 1913, filed for record May 30th, 1914, recorded in Book 2 of General Records at page 68. Description: Lot eight (8) and twenty-five (25) in Block number seven (7), in the Town of Cordova, as laid out and platted from United States Survey No. 449. [189—150]

Quitclaim Deed, Robert Ashland to Maud Ashland, dated August 31st, 1914, filed for record September 5th, 1914, recorded in Book 2 of General Records at page 94. Description: Lot eight (8) in Block number seven (7), an undivided one-half interest. All of these lots of the Town of Cordova, Territory of Alaska, as laid out and platted from the United States Survey No. 449.

Warranty Deed, H. B. Burkhart and A. E. Burkhart to Robert Ashland, dated July 1st, 1917, filed for record August 7th, 1917, recorded in Book 3 of General Records at page 287. Description: Lots eight (8) and twenty-five (25) in Block number seven (7), as laid out and platted from the United States Survey No. 449, which is recorded in Cordova Recording District, Alaska.

Warranty Deed, Robert Ashland and wife to Bank of Alaska, dated June 6th, 1917, filed for record August 2d, 1918, recorded in Book 4 of Gen-

eral Records at page 144. Description: Lot eight (8) in block number eight (8) in the townsite of Cordova.

Warranty Deed, Robert Ashland and wife to Bank of Alaska, dated September 25th, 1918, filed for record April 15th, 1919, recorded in Book 4 of General Records at page 311. Description: Lot eight (8) in Block number seven (7) according to the plat of the Town of Cordova, recorded in Book 1 at page 10.

Warranty Deed, John Reidy, H. A. Slater and H. I. O'Neill to the Reidy, Slater, O'Neill Company, Inc., dated October 3d, 1913, filed for record October 4th, 1913, recorded in Book 1 of General Records at page 365. Description: Lot seven (7) in Block number seven (7), as shown upon the official plat thereof in the Recorder's office of the Precinct of Cordova, Territory of Alaska.

Warranty Deed, O'Neill & Slater Company, a corporation, to H. A. Slater, dated April 30th, 1917, filed for record April 30th, 1917, recorded in Book 3 of General Records at page 203. Description: Lot seven (7) in Block number seven (7) according to the plat of the Town of Cordova, recorded in Book 1 at page 11.

Land Contract, George C. Hazelet to M. Finkelstein and J. Sapiro, dated June 9th, 1908, filed for record June 9th, 1908, recorded in Book 1 of Deeds at page 321. Description: Lot twenty-six (26) in Block number seven (7) according to the plat of the Town of Cordova, recorded in Book 1 at page 10. [190—151]

Warranty Deed, George C. Hazelet, Trustee, to Carstens Packing Company, dated April 3d, 1909, filed for record April 4th, 1909, recorded in Book 3 of Deeds at page 49. Description: Covered by United States Survey No. 449 and by patent from the United States Government for same, Lot twenty-six (26) in Block number seven (7) recorded at Book 1 at page 10 of the records of Cordova.

It is further agreed that this stipulation may be offered and received in evidence in the above-entitled cause as competent evidence of the making of the several conveyances and mortgages hereinbefore described, the dates thereof, the recording thereof, as and when specified, and the descriptions of property affected thereby.

Dated at Cordova, Alaska, this 8th day of December, A. D. 1919.

DONOHOE & DIMOND,
By ANTHONY J. DIMOND,
Attorneys for Plaintiffs.
B. O. GRAHAM,
EDWARD F. MEDLEY,
Attorneys for Defendants.

Mr. MEDLEY.—In the matter of the deposition of defendants' witness, Robert Ashland; through some error the deposition was not completed when originally taken and a stipulation was thereafter entered into to complete it. At this time the completed original description has not been received by the Clerk of the Court, although I have received a letter from the attorneys at Vancouver, B. C., that it has been completed and mailed to the Clerk of

the Court at Cordova, Alaska, and enclosing me a copy; and it is now agreed between the attorneys that my copy shall be sufficient to be filed as the deposition itself.

Mr. DONOHOE.—The plaintiff stipulates that the copy in the hands of counsel for the defendant may be considered as a completed answer to the deposition, provided, however, if the original [191—152] deposition reaches the Court before finishing with the case, it may be considered as the original deposition instead of the copy. We can go on with that until the original arrives here.

Mr. MEDLEY.—I will now read the deposition of Mr. Robert Ashland, taken in pursuance to stipulation attached, as follows:

In the District Court for the Territory of Alaska,
Third Division.

No. C—173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA,
Defendants.

Stipulation Re Deposition of Robert Ashland.

It is hereby stipulated and agreed by and between the parties, plaintiffs and defendants, in the above-entitled action, by and through their respective attorneys of record, that the deposition of ROBERT ASHLAND, a witness on behalf of the defendants,

may be taken upon written, direct and cross interrogatories to be propounded to said witness at the time of taking said deposition, by the officer before whom said deposition shall be taken; that said deposition may be taken before any person authorized under the laws of British Columbia to take depositions, at such time and times as the person authorized to take depositions may fix therefor, provided said deposition shall be taken as soon as possible and immediately mailed to the Clerk of the District Court, Cordova, Alaska, and in no event shall the deposition be taken later than October 18, 1919.

It is further stipulated that said deposition when taken and reduced to writing and certified by said person authorized to take depositions and filed in the court, may be read at the trial of the above-entitled cause, or at any re-trial thereof, with the same force [192—153] and effect as if said witness appeared at said trial in person and orally testified.

It is further stipulated that each of the parties reserve all legal objections to the testimony given by said witness and all objections to the form of the interrogatory or cross-interrogatory and may interpose any and all legal objections to said testimony and to the competency, relevancy and materiality of any direct interrogatory or cross-interrogatory or any answer thereto at the time the said deposition is offered in evidence, whether said objections appear from said deposition to have been made at the time of the taking of the same, or not.

It is further stipulated and agreed that all objec-

tions as to the manner of certifying said deposition and transmitting same to the clerk of the court is hereby waived so long as it appears from said deposition and the certificate of the person authorized to take depositions attached thereto, that the witness was duly sworn before testifying and that the testimony contained in said deposition was given by said witness in accordance with this stipulation.

Dated at Cordova, Alaska, this 7th day of October, A. D. 1919.

DONOHOE & DIMOND,

By T. J. DONOHOE,

Attorneys for Pltffs.

EDWARD F. MEDLEY,

B. O. GRAHAM,

Attorneys for Defts.

Mr. MEDLEY.—(Reading:) In conformity with the foregoing and annexed stipulation the following interrogatories are propounded by the defendants to Robert Ashland, one of the witnesses named in said stipulation:

Deposition of Robert Ashland, for Defendants.

Int. No. 1. State your name, age and residence.

A. Robert Ashland. Age, 50. Residence, Manitoba Hotel, Vancouver, B. C.

Int. No. 2. If you ever were a resident of the town of Cordova, [193—154] Alaska, state between what years you lived there.

A. Yes. Between 1908 and 1910. 1908, 1909 and 1910—those three years.

Int. No. 3. State whether or not you ever were

(Deposition of Robert Ashland.)

the owner of Lot seven in Block 7 of the town of Cordova, Alaska; and if your answer is in the affirmative, state when and from whom you purchased said lot.

A. Yes. I bought it from the Cordova Townsite Company; Hazelet was the agent; about June or July, 1908.

Int. No. 4. State whether or not during the time you were the owner of said Lot 7 a building was erected on said lot, and if your answer is in the affirmative, state when said building was erected and by whom.

A. July or August, 1908, by myself.

Int. No. 5. State whether or not you know that a building was erected on Lot 8 of said Block 7, adjoining said Lot 7 on the south, and, if your answer is in the affirmative state when and by whom the building on said Lot 8 was erected.

A. Yes. By Henry Burkhart.

Int No. 6. State whether or not the buildings erected on said Lots 7 and 8 were so constructed when erected, that the buildings on said lots joined at the dividing line between said lots.

A. Second stories joined.

Int. No. 7. If your answer to the preceding question is in the affirmative, state whether or not a hallway between the buildings on said Lots 7 and 8 was left on the ground floor at the time said buildings were erected. A. Yes.

Int. No. 8. If you have stated that such a hallway was made when said buildings were erected, state

(Deposition of Robert Ashland.)

the approximate width and [194—155] height of said hallway, and how much each of said lots 7 and 8 was occupied by said hallway.

A. About 8 feet wide and about 12 feet high. About 4 feet of Lot 7 and 4 feet of Lot 8.

Int. No. 9. State whether or not you know who the owners were of Lots 25 and 26 in said Block 7, at the time the buildings were erected on said lots 7 and 8. For your guidance in answering this question, you are informed that Lot 26, Block 7, would be in the rear of Lot 7, Block 7, but facing on Second Avenue; said Lots 7 and 8 face on First Avenue of said town of Cordova.

A. Lot 25 was owned by Henry Burkhardt and Lot 26 was owned by M. Finkelstein.

Int. No. 10. If your answer to the preceding question is in the affirmative, state who was the owner of Lot 26, Block 7, and who was the owner of Lot 27, Block 7, at the time the buildings were erected on said Lots 7 and 8.

A. The same owners.

Int. No. 11. The plaintiffs in the above-entitled case, in paragraph VI of their Amended Complaint, allege:

“That in the summer of the year 1908 Lot No. Seven (7) in Block No. Seven (7) of the said Town of Cordova was owned by Robert Ashland; Lot No. Eight (8) in Block No. Seven (7) was owned by A. E. Burkhardt; Lot No. twenty-five (25) in Block No. seven (7) was owned by A. E. Burkhardt; Lot No. twenty-six

(Deposition of Robert Ashland.)

(26) in Block No. seven (7) was owned by M. Finkelstein; that at the said time the owners of said lots were about to erect buildings on their respective lots and they then and there orally agreed to open an alley eight feet wide from First Street to Second Street in said Town of Cordova, the centre of said alley running along the dividing line between Lots No. 7 and 8 and Lots No. 25 and 26 in Block 7 of the said Town of Cordova. That the then owners of Lot 7 and Lot 26 in Block 7 gave four feet of their said lots along the southerly side thereof for said alley and the then owners of Lots 8 and 25 of said Block 7 gave four feet along the northerly side of their said lots for said alley. That said alley thereupon became known and ever since has been known and called Burkhart Alley. That shortly after said agreement the owners of the said four lots, heretofore described, erected buildings on their said respective lots, the side walls of said buildings [195—156] being four feet from the side line of said lots, thus leaving a public way eight feet wide from First Street to Second Street; that when the said owners of said lots erected buildings on their respective lots, they made various and many entrances into said buildings from Burkhart Alley and in all manner treated said Burkhart Alley as a public highway. At the time said alley was opened up it was agreed between the owners of said four lots that the four foot

(Deposition of Robert Ashland.)

strip given by A. E. Burkhart for said alley along the northerly side of Lot 25, about 18 inches thereof should be used for the walk following the grade of the alley, and the remaining 2½ feet should be used for higher walks not following the grade of the alley but on the levels of the floors of the buildings erected on said Lot 25 so that the occupants in the apartments of said buildings might conveniently reach the same from said alley.”

State whether or not any conversation was had between the owners of said four lots, at or prior to the time said buildings were erected, concerning the manner in which said buildings should be constructed. A. Yes.

Int. No. 12. If in answering the last question you have stated that there was any conversation between the owners of said four lots, at or prior to the construction of said buildings, state who was present during such conversation when said conversation, as nearly as you can determine, and what was said by the owners, of said four lots concerning the manner in which said buildings should be erected.

A. Well, I can't remember exactly who was present. I know Henry Burkhart's brother was present. Then Finkelstein, Henry Burkhart and myself had a conversation. They were all present at the same time. We agreed to build this hallway with the understanding that if at any time any of us wanted to close up the hallway, we had a perfect right to do so.

Int. No. 13. State whether or not at or prior to

(Deposition of Robert Ashland.)

the time said buildings were erected, there was ever any conversation between the owners of said four lots, relative to opening an alley eight feet wide from First Street to Second Street in said town of [196—157] Cordova, with the centre of said alley running along the dividing line between Lots 7 and 8 and between Lots 25 and 26 in Block 7 of said town of Cordova, and if your answer is in the affirmative state what was said and by whom.

A. This is answered by the answer to No. 12.

Int. No. 14. State whether or not, at or prior to the time said buildings were erected, there was ever any conversation between the owners of said four lots, relative to the owners of Lot 7 and Lot 26, in said Block 7, giving four feet of their said lots along the southerly side thereof for such alley, or the then owners of Lots 8 and 25 in said Block giving four feet along the northerly side of their said lots for said alley, and if your answer is in the affirmative, state what was said and by whom, and who was present at the time.

A. I have answered this already in Nos. 11 and 12.

Int. No. 15. State whether or not, at or prior to the time said buildings were erected, there was ever any conversation between the owners of said four lots relative to A. E. Burkhart leaving about eighteen (18) inches of the northerly four feet of said Lot 25 to be used for a walk following the grade of said so-called alley, and the remaining two and one-half ($2\frac{1}{2}$) feet of the northerly four feet of said Lot 25 being used for higher walks not follow-

(Deposition of Robert Ashland.)

ing the grade of said so-called alley, but on the levels of the floors of said building erected on said Lot 25 to enable the occupants of the apartments of such building to reach the same from said so-called alley; and, if your answer is in the affirmative, state what was said and by whom, and who was present at the time.

A. Yes. Two and a half feet. Only one foot and a half was taken for the alley from Lot 25, in order that if the other owners would close the alley there still would be access to the different [197—158] entrances in the apartment house.

Int. No. 16. State whether or not, at any time when you were the owner of said Lot 7, Block 7, there was ever any conversations between the owners of said four lots, or any of them, at which you were present, relative to making said so-called Burkhardt Alley a public highway, or a public alley, street or thoroughfare; and if your answer is in the affirmative, state what was said, by whom, who was present at the time, and approximately at what time said conversation occurred. A. No; never.

Int. No. 17. State whether or not, at the time you erected the building on said Lot 7, Block 7, you intended to dedicate the four feet of the southerly side of said lot to the public use as a highway.

A. No; never.

Int. No. 18. State whether or not, at the time you erected the building on said Lot 7, Block 7, you intended to retain control, dominion and possession of the southerly four feet of said lot. A. Yes.

(Deposition of Robert Ashland.)

Int. No. 19. State whether or not any conversation was had between the then owners of said four lots at or prior to the time of the erection of the said buildings thereon, relative to the right of any or all of the owners of said four lots to close or otherwise prevent the use of their respective portion of said so-called alley. A. Yes.

Int. No. 20. If you answered the last interrogatory in the affirmative, state when such conversation occurred, as near as you can determine the time, who was present, and what was said and by whom. [198—159] A. This is answered by No. 12.

Int. No. 21. State whether the plank foot-walk crossing the regular alley running north and south through said block and which connects that part of the so-called Burkhart Alley, between said Lots 7 and 8 and that part thereof between Lots 25 and 26, was constructed or maintained by the town of Cordova or by the owners of said lots.

A. It was constructed and maintained by the owners of the said lots.

(Direct examination closed.)

Mr. DIMOND.—I will read the Cross-Interrogatories.

Cross-Int. No. 1. Do you at this time own Lot 7 or 8 in Block 7 of the town of Cordova, Alaska, or any interests in said lots or either of them?

A. No.

Cross-Int. No. 2. State when you erected the building on Lot 7, Block 7, town of Cordova, Alaska.

A. About July or August, 1908.

(Deposition of Robert Ashland.)

Cross-Int. No. 3. Commencing with the year 1908, how long thereafter did you live and reside in said town of Cordova, and when did you last visit said town of Cordova?

A. I resided in the town of Cordova from its start about July, 1908, until late in the fall of 1910. My last visit was in September of last year. I visited Cordova once or twice every year.

Cross-Int. No. 4. It is a fact, is it not, that when you erected the building on Lot 7, Block 7, in 1908, you constructed the south wall of said building four feet north of the south line of said lot, thereby leaving four feet for an alleyway and when A. E. Burkhardt constructed the building on Lot 8, Block 7, he constructed the north wall of his building four feet south of the north line of Lot 8, thereby leaving four feet for an alleyway and [199—160] this made an eight foot alleyway between the buildings on Lot 7 and the building on Lot 8, as high as the second floor of said building? A. Yes.

Cross-Int. No. 5. It is a fact, is it not, that when M. Finkelstein erected the building on Lot 26, Block 7, he constructed the south wall of his building four feet north of the south line of said lot, thereby leaving four feet for an alleyway and when Burkhardt and Barber erected the building on lot 25, in Block 7, they constructed the north wall of this building four feet south of the north line of this lot, thereby leaving four feet for an alleyway, except as this four feet was occupied by a high walk along the

(Deposition of Robert Ashland.)

floor levels of this building?

A. Yes; except two and a half feet of Lot 25.

Cross-Int. No. 6. It is a fact, is it not, that when the building on Lots 7 and 8 and on Lots 25 and 26 in Block 7, were erected in the fall of 1908, there was an eight-foot alleyway, excepting that part occupied by the high walk along the building on Lot 25, from First Street to Second Street, through and over which the general public traveled every day?

A. Yes; anybody could travel through there, with our permission, of course. We could close it up at any time.

Cross-Int. No. 7. It is a fact, is it not, that when this alleyway was first opened up for the public to travel back and forth, the high walk along the building on Lot 25 had been erected and that this alleyway was in the same condition as to width when you were last in Cordova as it was when it was first opened in 1908? A. Yes.

Mr. DIMOND.—The answers to the remaining cross-interrogatories, as [200—161] shown by copy furnished by counsel, are as follows:

Cross-Int. No. 8. It is a fact, is it not, that from the time Burkhart Alley was first opened up until the time you left Cordova, the general public traveled through and over it continuously without permission from anyone and without any hindrance or objection being made by anyone?

A. The answer is the same as No. 6. Anybody could travel through there with our permission, of course, but it could be closed up at any time.

(Deposition of Robert Ashland.)

Cross-Int. No. 9. It is a fact, is it not, that during the time you were the owner of any of the property bordering on Burkhart Alley you did not do any act to prevent the general public from the free use of it as a public highway. If you answer that you did, state in detail what acts you did to so prevent it being used as a public highway? A. No.

Cross-Int. No. 10. When you were negotiating with McDonald & Reidy for the sale of Lot 7, in the year 1910, and at a time when you were the owner of said Lot 7 of Block 7, did you not state to David McDonald that Burkhart Alley was a great advantage to this property and that when the alley was first opened up it was agreed between the owners of the four lots bordering on the alley that it could not be closed, except with the consent of all the owners of said four lots or make a statement to him in words to this effect? A. No.

Cross-Int. No. 11. It is a fact, is it not, that in 1908, it was agreed between the owners of the lots bordering on Burkhart Alley, that this alley could not be closed by any of the owners of these lots, except with the consent of all of said owners? [201—162] A. No.

Cross-Int. No. 12. It is a fact, is it not, that when you commenced business in the building on Lot 7 and during all the time you were engaged in business there, you considered it an advantage to have Burkhart Alley open as a public highway and to have the public use it freely as a highway?

A. Yes.

(Deposition of Robert Ashland.)

Cross-Int. No. 13. Was not Burkhart Alley opened up as a public highway in 1908 because you wanted to be on a street corner with your saloon business on Lot 7; Burkhart wanted to be on a corner with his business on Lot 8 and Finkelstein wanted to be on a corner with his clothing business on Lot 26? A. Yes.

(Signed) ROBERT ASHLAND.

I hereby certify that on the 15th day of October, 1919, Robert Ashland appeared before me at my office in the Winch Building, Vancouver, British Columbia, and first having been sworn by me to tell the truth, the whole truth and nothing but the truth, made answer to the interrogatories and cross-interrogatories propounded to him by the defendants and plaintiffs respectively; that his answers to the same were taken down in shorthand, and having been transcribed into longhand they were on the 17th day of October, 1919, read over and signed by him as corrected.

IN WITNESS WHEREOF I have hereunto attached my hand and seal of office this 17th day of October, 1919.

[Notarial Seal]

W. J. BAIRD,

A Notary Public in and for the Province of British Columbia.

My Commission is indeterminate in time.

I hereby certify that on the 25th day of November, 1919, Robert Ashland appeared before me at my office in the Winch Building, Vancouver, British Columbia, and first having been sworn by me to tell the truth, the whole truth and nothing but the truth,

(Testimony of H. A. Slater.)

made answer to [202—163] the cross-interrogatories propounded to him by the plaintiffs and contained in the stipulation of the 7th day of October, 1919, and by inadvertence unanswered on his previous appearance before me on the 15th day of October, 1919; that his answers to the same were taken down in shorthand and having been transcribed into longhand they were on the said 25th day of November, 1919, read over and signed by him as correct.

IN WITNESS WHEREOF I have hereunto attached my hand and seal of office this 25th day of November, 1919.

W. J. BAIRD,
Notary Public.

Mr. MEDLEY.—We will file this copy to supplement the original.

The COURT.—Very well.

Mr. MEDLEY.—We will call Mr. Slater. [203—164]

Testimony of H. A. Slater, in His Own Behalf.

H. A. SLATER, one of the defendants, called and sworn as a witness in his own behalf, testified as follows:

Direct Examination.

(By Mr. MEDLEY.)

Q. State your name and residence.

A. Henry A. Slater; Cordova, Alaska.

Q. You are one of the defendants in this case?

A. Yes, sir.

Q. You are the owner of Lot 7, Block 7, in the town of Cordova? A. Yes, sir.

(Testimony of H. A. Slater.)

Q. Have you served on the Common Council of the Town of Cordova? A. Yes, sir.

Q. How many terms? A. I served five years.

Q. Do you know what years you served?

A. I think 1912, 1913, 1914, 1915, 1916 and 1917.

Q. Did you ever serve as Mayor?

A. Two terms.

Q. Did you ever hold any other official position in the town of Cordova? A. City Assessor.

Q. How many years did you act as City Assessor?

A. Three years—1917, '18 and '19.

Q. Now, Mr. Slater, you of course are familiar with what is known as Burkhart Alley?

A. Yes, sir.

Q. Part of your residence on Lot 7, Block 7, and part of your building on Lot 7, Block 7, completely covers a portion of Burkhart Alley adjoining your lot or on your lot? A. Yes.

Q. Were you a regular attendant at meetings of the City Council [204—165] when you served thereon? A. Yes, sir.

Q. During the five terms that you served as city councilman, did the Council ever consider and treat Burkhart Alley as a public highway?

Mr. DONOHOE.—We object as a conclusion. Let him state what the Council did do with reference to Burkhart Alley.

The COURT.—He may state what was done.

Q. Was anything ever done in that respect to your knowledge by the City Council?

A. No, sir.

(Testimony of H. A. Slater.)

Q. Referring to your duties as City Assessor, will you tell the Court what they were?

A. I assessed the values in the Town—real estate and improvements and personal property.

Q. Calling your attention to Lot 8 in Block 7, owned now, I believe, by the Bank of Alaska—while you were city assessor did you assess the full width of that lot as shown by the plat? A. I did.

Q. The full 25 feet? A. Yes, sir.

Mr. DONOHUE.—We object as leading.

Q. State whether or not you did assess the full width of that lot.

A. I did assess those lots the same as other lots in the town.

Q. State whether or not in fixing the assessment on Lot 8 in Block 7 and on Lot 7 in Block 7 you considered their width as 25 feet?

Mr. DONOHUE.—We object to what he considered. He has told what he did—he assessed the lots. We object as calling for a conclusion of the witness.

The COURT.—You are asking how he arrived at the assessment? [205—166]

Mr. MEDLEY.—I will put the question again.

Q. State whether or not in setting the value on Lot 7 in Block 7 when you were acting as assessor, you based your assessment, your estimate of the value, on the lot as a 25 foot lot?

A. I did; yes, sir.

Q. Now, state whether or not, Mr. Slater, while you acted as assessor in estimating the value of Lot

(Testimony of H. A. Slater.)

25 and Lot 26 in Block 7, you based your estimate of the value on 25 ft. lots? A. I did.

Q. State whether or not you were the owner of Lot 7 in Block 7 during the times you made the assessment? A. I was; yes.

Q. Now, Mr. Slater, I wish you would tell what you did when you went to the City Council about closing this lot—what you said to the Council?

A. Well, I was figuring on building on the lot—
The COURT.—Fix the time.

Mr. MEDLEY.—It is the time referred to by Mr. Lathrop as this year.

Mr. DONOHOE.—I move the witness be instructed in answering to relate what he did or what he said or what the members of the Council said at this meeting.

The COURT.—Tell what was said, and what was done—not any conclusion.

Q. What was said by you and what was said by the members of the Council?

A. I was figuring on building on that lot—

Mr. DONOHOE.—We move to strike that.

Q. Tell what you did.

A. I appeared before the Council—I came before the Council and told them that I expected to use that alley, not that I thought [206—167] they had any right—

Q. Tell what you said.

A. I came up before the Council and told them I expected to use the alley and asked them if there was any objection, not because I thought they had any right—

(Testimony of H. A. Slater.)

Mr. DONOHOE.—We object to that.

Mr. GRAHAM.—I think he may explain why he did that.

The COURT.—He may state what he said to the Council and what was said to him.

Q. What did the Council say?

A. The Council told me that they had no objection to my using the alley—that is, a majority of the Council.

Q. Told you to go ahead and use it?

A. They did.

Q. Did any member of the Council object?

A. One.

Q. Which one? A. Mr. Lathrop.

Q. Is he one of the plaintiffs in this suit?

A. He is.

Q. What did he say about it?

A. He said that if the Burkhart Alley was closed, they would take up the crossing and he would be damaged.

Q. State whether or not he said this—

Mr. DONOHOE.—We object to that—let him state what he said.

Q. Did Mr. Lathrop have any objection to closing the alley, if the crossing was not disturbed?

Mr. DONOHOE.—We object on the ground that it is leading—let the witness state what Mr. Lathrop said.

The COURT.—State as near as you can what was said and done by the Council? [207—168]

A. Mr. Lathrop said at the meeting that he ob-

(Testimony of H. A. Slater.)

jected to the alley being closed because they would take the crossing up if the alley was closed and it would damage his property.

Q. It would result in the taking out of the crossing?

A. It would result in the taking out of the crossing; yes, sir.

Q. What crossing did he refer to?

A. The one leading from the Burkhart Alley.

Q. On what street? A. First Avenue.

Q. Were you on the City Council in 1914?

A. Yes.

Q. The plaintiff has read in evidence here certain extracts from minutes of the City Council referring to moving or placing of fire hydrants at each end of the alley in the middle of Block 7—do you remember such action by the City Council?

A. Yes, sir, I do.

Q. What was the reason the City Council desired to place the fire hydrants at such places?

A. It was in the middle of the block. That was a long block between B and C and they thought for fire protection they should have hydrants there, one on First and one on Second Avenue.

Q. Mr. Slater, state whether or not you ever objected to any person using that alley?

A. No, sir, I did not.

Q. Did you ever have any knowledge of anybody representing the City, or did anybody representing the city ever inform you that that alley was claimed as a public highway? A. No.

(Testimony of H. A. Slater.)

Q. State whether or not you ever had any knowledge of the fact that [208—169] the public, in using the alley, was creating a public highway.

Mr. DONOHOE.—We object to that as incompetent, irrelevant and immaterial.

Objection sustained; defendants allowed an exception.

Q. State whether or not you ever intended by allowing the public to use the alley to dedicate the road to the public.

Mr. DONOHOE.—We object as to what he intended as incompetent and irrelevant—what he did is the question.

Objection sustained; defendants allowed an exception.

Q. While you were the owner of Lot 7 in Block 7 did anybody ever insist to you that they had a right to use the alley? A. No.

Q. State whether the public using the alley ever inconvenienced you in the use of your property.

A. No, sir.

Q. State whether or not you know who paid for the lights in the alley.

A. No, I couldn't say who paid for the lights in the alley.

The COURT.—Go back to the question I sustained the objection to—while it would not be controlling in the case, I think that question is competent after all. He may have intended to dedicate it and may not—in the form the question is put, I think it is competent.

(Question read as follows:)

(Testimony of H. A. Slater.)

Q. State whether or not you ever intended by allowing the public to use the alley to dedicate the road to the public. A. No, I did not.

The COURT.—I take it that acts are really controlling; however, in the form the question is put, I believe it is competent.

Q. Mr. Slater, state whether or not while you had charge and owned [209—170] that block—that lot, not block—the city ever repaired the sidewalk on First Street in front of the alley?

A. No, sir.

Q. Who repaired it? A. I did.

Q. You repaired the sidewalk in front of the alley the same as you did the sidewalk in front of the drugstore? A. Yes, sir.

Q. Do you know who repaired the sidewalk in front of Lot 8? A. Mr. Burkhart.

Q. State from your experience as a councilman whether the City repairs those parts of the sidewalk where the public alley running north and south through the centre of the block crosses the sidewalks through the main streets.

A. Yes, sir, they do.

Q. The city repairs them? A. Yes, sir.

Q. Now, Mr. Slater, what would you say as to the extent of the travel through Burkhart Alley as compared with the travel on B & C Streets?

A. I can't make any comparison; I have heard people make it, but I can't draw any conclusion, but I think when the postoffice was on Second Avenue there was a great deal of travel through the alley,

(Testimony of H. A. Slater.)

but at the present time I don't think there is much travel through it.

Q. When the postoffice was in the Ostrander Building would you say the travel through the alley was about the same as B or C Streets or more or less?

A. I don't think it would be more—it may be less; I think it would be less—I couldn't say; I don't know. [210—171]

Q. You testified that as assessor you assessed the four lots described in this complaint as 25 ft. lots?

A. Yes.

Q. State whether or not you as the owner of Lot 7 in Block 7 paid taxes on the assessment as made by you? A. I did.

Q. Do you know the width of the alleys in the town of Cordova? A. No, I do not.

Q. Are they wider or narrower than the Burkhart Alley?

A. They are wider than the Burkhart Alley—the alleys of the town must be about 20 feet.

The COURT.—That is shown by the plat.

Mr. MEDLEY.—That's all.

Cross-examination.

(By Mr. DONOHOE.)

Q. What was the first year that you served as councilman? A. I think it was 1912.

Q. And then did you serve each succeeding year for five years? A. Yes, sir.

Q. And then you served up until the spring of 1917? A. Yes.

(Testimony of H. A. Slater.)

Q. I understood you to say that during all the time you were on that council you had no knowledge of the councilmen exercising any supervision over or doing anything connected with the Burkhart Alley?

Mr. MEDLEY.—He didn't say that.

Mr. DONOHUE.—I will change that—

Q. Did the Council while you were on it do anything with relation to Burkhart Alley, such as ordering lights for it or sidewalks repaired or placing hydrants opposite it, or lamp-posts opposite [211—172] it, or anything of that sort?

A. When I was on the Council?

Q. Yes.

A. I don't know anything about the lights—I remember about the hydrants, though.

Q. You remember the placing of hydrants?

A. Yes, sir.

Q. I believe you said those hydrants were placed in the middle of the block, of Block 7?

A. Yes, about in the middle of 7.

Q. You said in the middle? A. I think so.

Q. You know that the middle of the block would be 25 feet further south than they are placed?

A. They are placed at the dividing line between 7 and 8.

Q. It should be the dividing line between 8 and 9? A. You may be right.

Q. You don't know as a matter of fact that those hydrants were placed where they were placed particularly to be opposite the entrance to Burk-

(Testimony of H. A. Slater.)

hart Alley, so in case of fire you could work the hose through Burkhart Alley?

Mr. MEDLEY.—We object to that is incompetent, irrelevant and immaterial.

Objection overruled; defendants allowed an exception.

A. It may have been.

Q. Now, do you recall during the time that you were on the Council of the lamp-post on Second Street being moved south about 52 feet in order to be opposite Burkhart Alley and light the alley?

A. I do.

Q. You remember that being done by the Council? [212—173] A. Yes.

Q. You attended the Council meetings regularly, did you? A. Yes.

Q. Do you recall, at this time, Mr. O'Neill, on May 18, 1914, then a partner with you in the ownership of Lot 7, appearing before the Council and asking that a light be placed in Burkhart Alley?

A. I don't recall that to mind; no, sir.

Q. If the record shows such thing, it is your opinion that it is true?

A. Yes, sir; I think it is true, all right.

Q. I will ask you, while you were a member of the Council in December, 1916, if you remember this matter coming before the Council. It is on page 437, Book One, of the minutes of the City Council of the Town of Cordova. It was reported that Burkhart Alley was in bad condition and it was decided the owners should be notified to have

(Testimony of H. A. Slater.)

it repaired? A. I don't recall the incident.

Q. It is your judgment, though, that it took place, if it appears on the records that way?

A. Yes.

Q. You heard the City Clerk read the extracts from the record yesterday? A. Yes, sir.

Q. And you have no reason to believe that the records are in any way false?

Mr. MEDLEY.—We object to that as not cross-examination.

Mr. DONOHUE.—I will withdraw the question.

Q. In regard to this assessment—it is a fact, is it not, that you assessed all lots as they appear upon the plat, without reference [213—174] to feet? A. Yes, unless it is a fraction of a lot.

Q. You say in 1917 you were the assessor?

A. Yes.

Q. You assessed your lot 7 for \$5,000, did you not? A. Yes.

Q. And you assessed lot 8 for \$5,000?

A. Yes.

Q. You assessed the two lots adjoining 7, Numbers 5 and 6, for \$15,000, 50% higher than your own—\$7,500 a lot? A. Yes.

Q. And you assessed Mr. Hazelet's lots, just below Lot 8, at a considerably higher figure than you assessed Lot 8? A. Lot 7—yes.

Q. In the deeds you obtained to Lot 7 the description was not by metes and bounds but by lots—it wasn't by feet? A. No.

(Testimony of H. A. Slater.)

Q. And 7 and 8 have always been treated as far as you know as lots that appear upon that plat, without reference to the feet? A. Yes.

Q. Now, Mr. Slater, during all the time that you were the owner of Lot 7 in Block 7, there was considerable public travel through that alley, was there not? A. Yes, sir.

Q. Did you ever do anything, up until last September, when you put up the fence—previous to that, did you ever do anything to in any manner impede the public travel through that alley?

A. I did not.

Q. You never protested in any manner or made any objection to anybody traveling through? [214—175] A. No.

Q. You never put up any sign at the First Street entrance that it was private property, at the entrance to the alley? A. No, sir.

Q. There was not to your knowledge any sign in the alley saying it was private property?

A. Not to my knowledge.

Q. Previous to appearing before the Council this fall, just previous to putting up the fence, you had individual talks with practically all the members of the Council and asked them individually if they had any objection?

Mr. MEDLEY.—We object to that question, unless they are dealing with the Council officially.

Objection sustained.

Mr. DONOHOE.—I am not particular about the question. That is all.

(Testimony of H. A. Slater.)

(By Mr. MEDLEY.)

Q. Mr. Slater, as assessor, you are familiar, naturally, with the real estate values in Cordova?

A. Yes.

Q. What is the most valuable block in Cordova as to valuation?

A. The highest assessed lot in town is the Alaska Hotel.

Q. The block, not building? A. Block 7.

Q. That is the block in which the so-called Burkhart Alley is located? A. Yes, sir.

Q. State whether or not that fact had anything to do the placing of these hydrants in Block 7 as referred to in these Council meetings, at the end of Burkhart Alley. [215—176]

A. Yes, it did have. Block 7 being the most valuable block in town, they thought it needed more fire protection; therefore those hydrants were placed on First and Second Avenue.

Q. Tell the Court why you did not protest or object to people using the alley.

A. I have no objection to people using my property when I am not using it.

Q. Did the public use of the alley inconvenience you in any way? A. No, it did not.

Q. If it had inconvenienced you, would you have objected to the public travel?

Mr. DONOHOE.—We object to that.

Objection sustained; defendants allowed an exception.

Q. Mr. Donohoe has asked you a question as to

(Testimony of H. A. Slater.)

why you assessed his two lots at \$15,000 and your own at \$5,000?

A. Because his is 50 feet with a good building on it. It is assessed at \$15,000. If you go down further to 12, 13 and 11; those are 25 foot lots with 100 feet depth and are assessed at \$7,500. The building Lots 7 and 8 are poor buildings; that is why the low value was placed on these lots, but the other lots, 25 feet, with buildings, on First Avenue are assessed at \$7,500.

(By Mr. GRAHAM.)

Q. Mr. Donohoe has asked you whether or not you had a sign up, at the other end of this lot—I will ask you whether or not it is customary in Cordova to put up signs on buildings, private property? A. No. [216—177]

(By Mr. MEDLEY.)

Q. Do you know of any other alleys in Cordova, private alleys, similar to that Burkhart Alley?

A. I do.

Q. Where is it?

A. Between Lots 12 and 13, First Avenue.

Q. In what block? A. Seven.

Q. Where does the alley run from?

A. Between the Model Restaurant and the City Bakery.

Q. From First Avenue through the alley running north and south, the same as this alley, in this same block? A. Yes, sir.

Q. Who owns the buildings, the lots where that alley is? A. Tom Davidson and myself.

(Testimony of H. A. Slater.)

Q. Is that alley covered over? A. Yes, sir.

Q. Is it used by the public, by anybody that wants to use it—any objection ever made?

A. No.

Q. You consider that your own private property? A. I do.

(By Mr. DONOHOE.)

Q. Mr. Slater, how wide is that alley you have just testified to? A. Four feet.

Q. You took the precaution to put a gate on each end?

A. No, on one end—to keep the dogs out.

Q. There is a gate at this end?

A. No. [217—178]

Q. There is no obstruction there at all?

A. The door is off; it came off three years ago. There was a door there, but the door blew off two or three years ago.

Q. And you never put it back on?

A. No, sir.

Q. Do you want to be understood as saying that that alley has ever been used like the Burkhart Alley?

A. No, it don't go clear through the block, only back to the alley.

Q. You know, as a matter of fact, do you not, Mr. Slater, that that alley is not used as a thoroughfare for people going through at all?

A. They can use it, and they do use it.

Q. Where do they go?

A. Back to the alley—people living back in the

(Testimony of H. A. Slater.)

cabins, back there, and in the Borden Building, they go back through there.

Q. And do you think it has been generally traveled?

A. By people that go back through that way, yes.

Q. But people that don't live in the rear there, don't go through it? A. No, not much.

(By Mr. MEDLEY.)

Q. What did you have a gate on the alley for?

A. To keep the dogs out.

(By Mr. DONOHOE.)

Q. You had a gate there from the time you put up this building? A. No, I did not.

Q. You have one there now? A. Yes, sir.

Q. And when were those buildings erected?
[218—179]

A. I put that story, that second story, on the Restaurant building in 1910, I think.

Q. Up to that time, there was no cover over this runway? A. No.

Q. Going back to the assessment on Lot 7 which you say is assessed 50% lower than my assessment on Lot 6—you stated that I have a good building on it. Is it not a fact that your Lot 7 has a 100 foot building, 20 feet wide and 100 feet long, with two stories? A. Yes.

Q. And my building is a building 50 feet wide, two stories, and 100 feet long?

A. The difference between your building and mine is that mine brings in \$100 per month for

(Testimony of H. A. Slater.)

the whole building—that is all the revenue it brings in.

Q. How about 1917?

A. It wasn't bringing in quite that much.

Q. Mine is only bringing in \$200.

A. There are very poor rooms upstairs—very dark and very poor.

Witness excused. [219—180]

Testimony of John J. Goodale, for Defendants.

JOHN J. GOODALE, a witness called and sworn on behalf of the defendants, testified as follows:

Direct Examination.

(By Mr. MEDLEY.)

Q. What is your name and residence?

A. John J. Goodale; Cordova.

Q. How long have you lived in Cordova?

A. Since 1908, I guess; early spring of 1908.

Q. Have you served on the Common Council of the town of Cordova? A. Yes, sir.

Q. When? A. 1914, I think it was.

Q. You served one term?

A. I served one term.

Q. What committee did you serve as chairman of the year you were on the Council?

A. I was chairman of the street committee and the police committee.

Q. Did you ever hold any other official position in the town of Cordova? A. Yes, assessor.

Q. When was that?

(Testimony of John J. Goodale.)

A. I was the first assessor of the town.

Q. 1911? A. Yes.

Q. You were the first assessor of the town?

A. Yes.

Q. You are familiar with what is known as Burkhart Alley? A. Yes, sir.

Q. Was that alley where it is now, at that time?

A. Yes.

Q. Was it in the same condition in 1911 when you were assessor? [220—181] A. Yes.

Q. You proceeded to determine the values in 1911? A. Yes.

Q. I call your attention to Lot 7 and Lot 8 in Block 7 and Lots 25 and 26 in Block 7; in determining the values of those lots for the assessment, did you consider them as 25 foot lots?

A. Yes, sir.

Mr. DONOHUE.—We move to strike the answer as incompetent, irrelevant and immaterial, as to what he considered in making up his assessment.

Motion denied; plaintiffs allowed an exception.

Q. Do you remember what you assessed that property at?

Mr. DONOHUE.—We object as not the best evidence.

The COURT.—You may state if you know.

A. Yes, I do.

Q. What did you assess it at? Lots 7 and 8 in Block 7?

Mr. DONOHUE.—Same objection.

(Testimony of John J. Goodale.)

Objection overruled; plaintiffs except.

A. The total assessment of the property—

Q. Those two lots I mean, Lot 7 and 8, in Block 7? A. It was \$5,400, I think, for each.

Q. In determining the value put on these lots, did you first figure the value of the real estate and then the value of the improvements?

Mr. DONOHOE.—We object to that as incompetent, irrelevant and immaterial, and leading.

Objection sustained as leading.

Q. State whether or not in determining the value you put on lots for assessment—

The COURT.—Ask him how he determined the value. How did you determine [221—182] the value of the property to be assessed, for instance, on Lot 7 in Block 7?

A. The town had never been assessed and I started in—I took the Adams corner as the basis—

Q. Give me the number of those lots.

The COURT.—He can determine how he arrived at the valuation of Lot 7 in Block 7.

Q. Tell the Court how you figured or determined the valuation you put on Lot 7 and Lot 8 in Block 7.

A. I put the valuation on the lots in that block at \$3,000 for each lot excepting corners—there was different valuations in the corners. Each of the lots through the block was \$3,000 on this side of the street.

Q. And then you added whatever you thought the improvements were worth?

(Testimony of John J. Goodale.)

A. Yes, then I figured the improvements and made the total assessment that way.

Q. Did you figure all the inside lots in Block 7 as the same valuation?

A. On this side of the street I did, but on the other side—

Q. That is a different block?

A. Yes, that is a different block. There was different values on Second Street, of course.

Q. On First Street—

A. On First Street all the same.

Q. All inside lots were the same?

A. Yes, sir.

Q. Did you or did you not reduce the valuation of Lot 7 and Lot 8 and 25 and 26 in Block 7 because of the Burkhart Alley?

Mr. DONOHOE.—We object to that as leading and incompetent, irrelevant [222—183] and immaterial.

The COURT.—He may answer.

A. I did not.

Q. During the term that you served as a member of the City Council, did the Council in any manner consider the Burkhart Alley as a public alley?

A. I don't know just what you mean by that. There was considerable travel through the alley, and it was used a great deal.

Q. Did the Council consider that they had control of the alley like other public alleys in the town of Cordova? A. Why, I don't think so.

(Testimony of John J. Goodale.)

Mr. DONOHOE.—We object to that question, and move to strike answer.

The COURT.—What he thinks may be stricken.

Q. Do you know whether they did or not?

A. They did not.

Q. As chairman of the street committee during the year you served on the Council, did you officially treat Burkhart Alley as a public highway, a public alley, and under your control and dominion as an officer of the town of Cordova?

Mr. DONOHOE.—We object to that as incompetent, irrelevant and immaterial.

The COURT.—As to whether the Council considered it a public alley or a private alley, I don't see that it makes very much difference—I am disposed to let him answer the question, but it is so remote that it seems almost immaterial. He may state fully what he did as chairman of the street committee with reference to Burkhart Alley.

Plaintiffs allowed an exception to the ruling.

Q. Did you ever do anything during the year you were on the Council and chairman of the street committee toward Burkhart Alley as a public alley and if you say you did, state what you did?

A. Well, I don't remember that I did anything as chairman of the [223—184] street committee, but I think on one or two occasions I saw planks broken in the alleyway there and it was part of my duty as chairman of the police department to see there was no danger there by the public travel-

(Testimony of John J. Goodale.)

ing through and I notified the owners there to repair it, to protect anyone traveling through.

Q. Who repaired and maintained that portion of the sidewalks in Cordova where the public alley through the blocks crossed the sidewalks to the main street?

A. You mean the plank in the alley itself?

Q. No; for instance, I refer to this Block 7; the public alley runs north and south through the block; when it crosses the sidewalk on C Street or B Street,—there is a portion of the sidewalk that it crosses—who repairs and maintains that portion of the sidewalk?

A. Why, the property owners; they maintain the sidewalk on the street, on Second Street or on First Street.

Q. The sidewalk in front of the buildings?

A. Yes, the sidewalk in front of the buildings.

Q. But the sidewalk in front of the public alley— A. I think the city.

Q. Did the city maintain the sidewalk in front of Burkhart Alley on First and Second Street?

A. Yes, they did.

Q. Mr. Slater testified that he and Mr. Burkhart—

Mr. DONOHOE.—I object to counsel cross-examining their own witness.

The COURT.—He may answer.

The WITNESS.—I think once or twice—there were some occasions, planks put into the sidewalk almost anywhere that the city would pay for it—

(Testimony of John J. Goodale.)

if the owners neglected it and there was danger to [224—185] anyone, they would put it in.

Q. You own any real estate in Cordova?

A. I do.

Q. State whether or not you are familiar with real estate values and rental values in Cordova?

A. Yes, I think so.

Q. Have you charge of any property in Cordova?

A. Yes, sir.

Q. Where is it located?

A. I have the postoffice building, for instance, and some in the next block.

Q. You are familiar with Mr. Lathrop's building and its location? A. Yes.

Q. Give your opinion whether Mr. Lathrop's building will depreciate in value if Burkhart Alley is closed?

A. Of course, that is something I can't say, I don't know.

Q. You are not competent?

A. I don't feel competent—I don't know from what angle it might be figured.

Q. Give your opinion as to whether the Borden Building, which you have charge of, will depreciate in value by the closing of Burkhart Alley?

A. I don't know of any depreciation—I don't know.

Q. Is it your judgment that it will or will not?

A. I don't think it will.

Q. Now, you use Burkhart Alley to go from First to Second Street? A. Quite frequently.

(Testimony of John J. Goodale.)

Q. Are you familiar with the fact that the public use it? A. Yes.

Q. What is your opinion as to the extent of the travel through [225—186] Burkhart Alley as compared with the travel on B and C Streets?

A. Well, it is considerably traveled through there—it may be as much traveled as it is on Second Street; of course, it wouldn't compare with the travel on First Street.

Q. I put it B and C Streets?

A. I couldn't say—there is considerable travel.

Q. Do you think there is more travel through the alley than on B or C Streets or about the same?

A. I should think probably about the same.

Q. There was more when the postoffice was on Second Street? A. Yes.

Q. There was read in evidence here yesterday by Mr. Robinson, the city clerk, an extract from the minutes of the Common Council as follows: October 21, 1912. Notice was given that a street light was wanted in the alley at the intersection of Burkhart Way and at various other points. The matter was referred to the Committee on Light with authority to use their own judgment in ordering new lights. Do you remember where that light was put in in Burkhart Alley?

A. Yes, sir, just about in front of the alley, up here on Second Street.

Q. This is at the intersection of Burkhart Alley and the other alley?

(Testimony of John J. Goodale.)

A. Yes, there was a light there—at the corner of the building there.

Q. How was it arranged? Do you know where the light is now?

A. Yes, I know about where it is. I remember the light that is on the corner of the Slater property—I think it was fastened to the buildings—I think it is either a piece of iron or pipe, I think pipe, fastened on to the building and jutting out and I think the wire ran through the pipe and connected with the light. [226—187]

Q. On to the public alley?

A. Yes, it was changed around. I don't know whether it is exactly on the corner now or in the center. It was changed on account of the snow drifting from the roof.

Q. The light is underneath the roof?

A. I don't know whether it is on the side or in the center.

Q. Fastened to the building? A. Yes, sir.

Q. You know it was not originally placed there? The light as originally placed was in the public alley?

A. Yes, it was originally out in the public alley but the iron was fastened to the corner of the building.

(By Mr. DONOHOE.)

Q. The light was put there for the purpose of lighting Burkhart Alley?

A. I suppose that is what it was for, and some of the other alley coming along there.

(Testimony of John J. Goodale.)

Q. You don't know of any other light maintained by the city in any of the alleys in the town of Cordova?

A. I don't know whether there is another at the other corner or not, I couldn't say.

Q. Do you know what the city paid for that light? A. No, I do not.

Q. You don't know whether they paid for it or not? A. I don't remember about that.

Q. You remember this matter coming up before the council when you were there?

A. I remember there was some talk about it, yes, —I don't remember what they did, though. [227—188]

Q. You were a member of the street committee, chairman? A. Yes, sir.

Q. Then you must have ordered that light put there?

A. No, that would be the chairman of the Light and Water Committee.

Q. Now, in regard to the Borden property and no depreciation in value as you have testified—that building is occupied by the United States postoffice?

A. Yes.

Q. It has no mercantile establishments in it at all? A. Not now; no.

Q. And the income of that property is not dependent upon customers or people doing business there?

A. Not at the present time; no.

Witness excused. [228—189]

Testimony of W. L. Smith, for Defendants.

W. L. SMITH, a witness called and sworn in behalf of the defendants, testified as follows:

Direct Examination.

(By Mr. MEDLEY.)

Q. What is your name and residence?

A. W. L. Smith; Cordova.

Q. How long have you lived in Cordova?

A. I have been in Cordova since April 24, 1908.

Q. You have lived here continuously since then?

A. Yes, here in Cordova.

Q. Have you ever served on the Common Council of the town of Cordova? A. I have; yes.

Q. How often?

A. I think I was on three years.

Q. What years were they?

A. I think in 1914, '15 and '16, or '17, which ever it is.

Q. I think you ended in April, 1917? A. Yes.

Q. Were you at any time chairman of the street committee of the town of Cordova, while you served on the council? A. For two years.

Q. What were your duties as chairman of the street committee?

A. To look after the streets and alleys.

Q. Do you know where the so-called Burkhart Alley is in Cordova? A. Yes, sir.

Q. Did you look after Burkhart Alley as chairman of the street committee?

A. No, the alley in between the buildings I had

(Testimony of W. L. Smith.)

cut down a time or two, there in the alley proper, not the Burkhart, no, but in the main alley in between the two buildings.

Q. Running north and south? [229—190]

A. Yes, running north and south—I done some work on that; yes, sir.

Cross-examination.

(By Mr. DONOHOE.)

Q. What was the work done on the alley for?

A. Cutting the ice down on the street. They shoveled the ice off of the buildings on to the alley and I had to have it cut out and thrown on one side a time or two.

Q. Where the Burkhart Alley crosses the regular alley? A. Yes, sir.

Q. Cut it down to make a passage back and forth through the Burkhart Alley?

A. No, through the main alley, north and south.

Q. Was there any foot travel between the regular alley?

A. Yes, some, but on account of teams I had to have it cut down.

Q. You also cut it down where it interfered with the crossing of Burkhart Alley?

A. I had it cut down in between the streets, not in between the buildings, no.

Q. Where did you have this ice cut out?

A. There is a 14 foot alley runs north and south.

Q. And this alley crosses the Burkhart Alley and the alley in between down there? A. Yes.

(Testimony of W. L. Smith.)

Q. You had that ice cut out?

A. I had that ice cut out.

Q. At the intersection of the Burkhart Alley and the regular alley?

A. Well, it was the regular alley that I had the snow cut out of, the ice,—so teams could get through.

Q. While you were on the council, do you remember the council at any time notifying or ordering the chief of police to notify the [230—191] owners along Burkhart Alley to repair their sidewalks?

A. Why, not that I remember of—they might have done it too but I don't remember exactly.

Q. Do you know in 1914 of the City Council ordering hydrants to be placed opposite each end of the Burkhart Alley?

A. Not that I remember—no, I don't remember that.

Q. To refresh your memory I read from the minutes of July 6, 1914—June 6, 1914, not July—on page 332, Book One of the minutes of the Town Council, as follows: It was moved and seconded that the placing of hydrants on First and Second Streets opposite Burkhart Alley be referred to the Fire Committee with power to act. The motion prevailed. Do you remember that transaction?

A. Why, it may have happened but I don't remember it—it is so long ago.

Q. Do you remember the council at any time having lights placed in Burkhart Alley?

(Testimony of W. L. Smith.)

A. I couldn't say as to that. I remember something about the lights but I don't remember exactly whether they had them put in the Burkhart Alley or not.

Q. Do you remember the lamp-post being changed on Second Street from the position it occupied about 50 feet north of Burkhart Alley to a position opposite Burkhart Alley?

A. I remember something about that lamp-post; yes.

Q. Why was it placed there?

Mr. GRAHAM.—We object as not proper cross-examination and it doesn't appear that Mr. Smith was on the council that year.

The COURT.—It is not cross-examination; objection sustained.

Q. You were on the council in November, 1916?

A. Yes, sir. [231—192]

Q. Reading to you, under date of November 6, 1916, which appears on page 437 in Book One of the minutes of the City Council of the town of Corrova, as follows: It was reported that Burkhart Alley was in bad condition and it was decided that the owners should be notified to have it repaired. Do you remember that transaction?

A. It might have happened, yes; but I don't remember exactly the time.

Witness excused. [232—193]

Testimony of Bartley Howard, for Defendants.

BARTLEY HOWARD, a witness called and sworn in behalf of the defendants, testified as follows:

Direct Examination.

(By Mr. MEDLEY.)

Q. State your name and residence.

A. Bartley Howard; Cordova, Alaska.

Q. How long have you lived in Cordova?

A. Since February 21, 1909.

Q. You have lived here continuously since then?

A. I have.

Q. Have you served on the Common Council?

A. I have.

Q. How many times? A. Four years.

Q. Four terms?

A. Four years—one year each term.

Q. Have you been chairman of the street committee?

A. I couldn't say positively that I have; I have served on the street committee—I couldn't say I have been chairman of the street committee.

Q. Have you ever been mayor of the town?

A. Acting mayor.

Q. How many terms? A. Part of one term.

Q. Were you on the Common Council in 1912?

A. I was; that was my first year.

Q. June 3, 1912? A. Yes.

Q. There has been read into the record here, October 21, 1912, the following extract from the min-

(Testimony of Bartley Howard.)

utes of the City Council: Notice was given that a street light was wanted in the alley at the intersection [233—194] of Burkhart Way and at various other points. Do you remember anything about that transaction? A. I do; yes, sir.

Q. I will state for your information that Mr. O'Neill testified yesterday in this matter—did you hear his testimony? A. I did.

Q. Mr. O'Neill said that he appeared before the council and requested this light? A. He did.

Q. Do you remember that? A. I do.

Q. Do you remember what was said about the light at that time?

A. Practically the conversation that we had; yes.

Q. Tell the Court what Mr. O'Neill said when he requested this light at the intersection of Burkhart Alley and the regular alley?

A. Mr. O'Neill appeared before the council and asked—

Mr. DONOHUE.—If this is intended as an impeaching question I object to it on the ground that there was no proper foundation.

Mr. MEDLEY.—It is not impeaching anybody.

Mr. DONOHUE.—If it is an attempt to impeach Mr. O'Neill they should have laid the foundation by an impeaching question.

The COURT.—He may state what was said.

The WITNESS.—(Continuing.) Mr. O'Neill appeared before the council and asked that the council place a light in the public alleyway at the rear end of his building, at that time known as the

(Testimony of Bartley Howard.)

Burkhart Alley, and stated his reasons, along this line—that they maintained lights in the alleyway opposite their buildings, between their building and the bank and they felt that it would be the duty of the council to this effect,—to maintain the light at the end of the alleyway, as they allowed the public to travel that alleyway [234—195] without any objection and for the benefit of the Fire Department, that they might operate in case of fire up and down the regular alley of the City of Cordova or through the alleyway of the Burkhart Alley.

Q. What do you mean by saying that they maintained lights in the alley?

A. Slater and O'Neill.

Q. The owners of the buildings there?

A. Yes. The council authorized the committee on fire protection, light and water, to place a light there and they placed it on an iron bracket on the rear end of the building over the alleyway, over the main alleyway of the City of Cordova and the Burkhart Alley.

Q. Over the public alleyway? A. Yes, sir.

Q. Over the fourteen foot alley?

A. Yes, sir; over the 14 foot alley.

Q. It extended down into that alley?

A. It extended out in the neighborhood of two feet, far enough for the ice not to interfere with it, and later it was authorized to be put underneath the alley to protect the globes, the ice was breaking it down, running down there and freezing on it.

Q. Where is the light now?

(Testimony of Bartley Howard.)

A. The light is in the center of the building, between the two buildings there, about 18 inches or two feet inside the alleyway.

Q. Underneath the roof of the alley?

A. Yes, sir.

Q. Do you know why it was put there?

A. For the protection of the light, to keep the ice from breaking it off at the rear end of the building. [235—196]

Q. Have you ever noticed any obstructions in the Burkhart Alley on the part occupied by Lots 7 and 8 in Block 7?

A. I don't know as I understand what you mean by obstructions—that there was anything in the way of the traveling public?

Q. Referring to those portions of Lots 7 and 8 in Block 7, which had been traveled by people using Burkhart Alley—have you seen any obstructions in that alley, placed there by the owners of those buildings? A. I have.

Q. What were they?

A. Well, if I remember right, in 1913, in the spring of 1913 when Slater & O'Neill had taken possession of that building or Reidy & MacDonald, during that winter Reidy & MacDonald maintained a small coal-box at the right of the alleyway going in from the rear end, right under the window just inside the door that enters the stairway; at that time and at different times I have seen freight and stuff in there. During December, 1917, Mr. Harwood had stored in that alleyway some 24 kegs of

(Testimony of Bartley Howard.)

near beer that were shipped here for the coming season, as liquor was going out and his license expired and this beer stood there for some time and froze and the kegs opened up and it ran over the sidewalk, and it was there for some week or ten days or two weeks, I judge, under protest.

Q. Did you see anything else in that alley?

A. During the time I replaced the sidewalk in front of the building I had the lumber hauled up there and stacked in the alleyway, out of the weather. It was a Sunday job, supposed to be done on Sunday, and if I shouldn't do it the following Sunday I would have left it there until the next Sunday. Also when Van Vechten put in his showcases, display counters, there, the freight was hauled up there. [236—197]

Q. Who was Van Vechten?

A. He occupied the building that the Cordova Drugstore occupies now, and he had his freight hauled up, and it stood in the alleyway and it obstructed the biggest part of the alleyway and was there for approximately 24 or 36 hours. We opened up the freight and set the boxes up in the evening—it was put in there out of the weather.

Q. Do you know who repaired and maintained the sidewalk on First Avenue in front of the Burkhart Alley?

A. I have repaired it there for the property owners.

Q. Who paid you for the work?

A. Slater & Burkhart.

(Testimony of Bartley Howard.)

Q. Do you know who maintains and repairs the sidewalks in the town of Cordova where there is a regular alley, regular public alleys, running north and south through the block, acrossed the sidewalk? A. The city of Cordova.

Q. Are you familiar with the extent of travel that has passed through the alley?

A. In a general way.

Q. Give your opinion as to how the travel in the alley compared with the travel that went up B and C Streets when the postoffice was in the Ostrander Building.

A. At that time, it was more or less similar, I should judge.

Q. About the same?

A. Yes, I should judge so.

Q. What would you say about it now, with the postoffice on First Avenue?

A. Nothing to compare with it at all.

Q. What street, which has the most travel, B and C Streets, or the alley? [237—198]

A. B and C. Streets, in my opinion.

Q. Now, Mr. Howard, were you one of the Common Council on December 10, 1917?

A. Yes, sir.

Mr. MEDLEY.—I offer in evidence for the purpose of continuing Mr. Howard's testimony an extract of some minutes of the meeting of the Common Council, certified by the Town Clerk of Cordova.

Mr. DONOHOE.—To which we object on the

(Testimony of Bartley Howard.)

ground that it is not the best evidence.

The COURT.—What is the purpose of the offer?

Mr. MEDLEY.—I want to show that the Council did not consider Burkhart Alley a public alley in 1917, and have Mr. Howard, who was then a member of the Common Council, explain the reference in the minutes to the raising of the assessment on Lots 7 and 8 in Block 7.

The COURT.—Of course, the objection that it is not the best evidence is a good objection, unless you show that the best evidence is not obtainable.

Mr. DONOHOE.—I will withdraw my objection and object to the introduction of it on other grounds,—on the ground that it is incompetent, irrelevant and immaterial—I withdraw my objection on the ground that it is not the best evidence.

The COURT.—What is the purpose of it now, Mr. Medley?

Mr. MEDLEY.—These are the minutes of the Board of Equalization, which the Court undoubtedly knows is the City Council, composed of members of the City Council, sitting as a Board of Equalization on the assessment-roll. This is an official statement, taken from the records, which shows that there was a discussion over the assessment on Lots 7 and 8 Block 7; that certain motions [238—199] were made to raise the assessment. I want to prove by Mr. Howard that the Council at the time those motions were considered, considered Burkhart Alley a private way, in determining these motions and settling the question.

(Testimony of Bartley Howard.)

The COURT.—I fail to see how that binds either of the parties—what the Council considered.

Mr. MEDLEY.—If the Court is of the opinion that the records of the town of Cordova have no bearing on this question, I am satisfied.

The COURT.—No, the Court has not expressed any idea like that, but what I intended to convey to you is this, that what the Council would do about what they thought the property was worth, I don't see how that has any bearing on the issues in this case, or is binding on either the plaintiff or defendant.

Mr. MEDLEY.—I will explain my theory of it to the Court: If the Council in determining the value of property had to determine whether the Burkhart Alley was a private way or public way, wouldn't it be important to the issues in this case what the officials, the representatives of the town of Cordova, did with respect to that alley being a public way?

The COURT.—What they did with respect to its being a public way, in exercising some dominion or control of it, but it seems to me we are building up a record that it is not very material; however, if you desire to introduce it, you may do so.

The extract of the minutes referred to is admitted in evidence, marked Defendants' Exhibit No. 7, and reads as follows: [239—200]

Defendants' Exhibit No. 7.**COPY OF THE MINUTES OF THE BOARD
OF EQUALIZATION HELD DECEMBER
10, 1917.**

On motion duly made and seconded it was voted to reduce the personal property assessment of James Smith on Lot 1 to \$300.00.

It was voted to raise the assessment on the real property situated on Lot 7 in Block 7—H. A. Slater, to \$6,000.00. The same motion was passed in regard to Lot 8, Block 7, assessed to Robert Ashland. At the request of Mr. Hillery, vice-president of the Bank of Alaska, Lot 8, Block 7 was assessed to the Bank of Alaska, which had purchased it from said Ashland.

Mr. Brock, representing the First Bank of Cordova, presented an affidavit stating that the total valuation of the property of said bank was \$25,000 capital and \$5,000.00 surplus, that \$12,500.00 of the capital had been invested in a bank building on Lot 29, Block 2 and that \$2,500.00 of the surplus had also been invested in said building. It was voted to assess said building at \$14,000.00 and the residue of the capital stock at \$16,000.00.

Mr. Hillery, representing the Bank of Alaska, put in an affidavit concerning the total property owned by said bank in Cordova. On motion it was voted to assess the building on Lot 8, Block 7, owned by said Bank at \$6,000.00 and to assess the residue of the capital at \$16,400.00.

It was moved by W. L. Smith to raise the valuation of Lot 7 in Block 7 to \$7,500.00. It was voted to excuse Mr. Capers from the Board to give legal advice on the Smith motion as the Board has previously raised this property from \$5,000.00 to \$6,000.00. Mr. Capers stated that a motion already carried can be reconsidered only by some one who voted in the affirmative on the previous motion. Mr. Smith having voted in the negative on the previous motion, the chair declared the motion out of order. It was voted on the new motion that the previous vote raising the assessment on lots 7 and 8 be reconsidered. Mr. Smith moved that each lot be assessed at \$7,500.00. Mr. Howard moved an amendment to substitute \$6,000.00 for the \$7,500.00. The amendment was carried.

M. Brock as agent of Estelle Blum filed an affidavit with the Board that the property on Lots 1, 2 and 3 of Block 15 was worth \$5,000.00 and was being assessed at \$6,500.00. It was voted to reduce the assessment to \$5,000.00.

W. H. Chase filed an affidavit stating that his personal property on Lot 22, Block 2, was worth \$1,000.00. It being assessed at \$1,500, it was voted to reduce the assessment to \$1,000.00.

No further matters appearing for the consideration of the Board, on motion duly made and seconded it was voted to adjourn *sine die*.

EDWARD F. MEDLEY,

Clerk.

W. H. CHASE,
Mayor.

(Testimony of Bartley Howard.)

United States of America,
Territory of Alaska,
Town of Cordova,—ss.

I, K. G. Robinson, the duly elected, qualified and acting Town Clerk in and for the Town of Cordova, Territory of Alaska, do hereby certify that the above and foregoing is a true and correct transcript of that portion of the proceedings of the Board of Equalization of the Town of Cordova appearing upon page 478 of the minute-book of said Board of Equalization, which said Board of Equalization consists of the members of the Town Council of Cordova in session for that purpose.

Given under my hand and the seal of said town, this 9th day of December, 1919.

(Seal of Town of Cordova.)

K. G. ROBINSON,
Town Clerk, Town of Cordova. [240—200 $\frac{1}{2}$]

Q. I call your attention to Plaintiffs' Exhibit No. 7, part of which reads as follows:

(Mr. Medley reads the portions of Defendants' Exhibit No. 7, just entered in full in the record, that refer to the assessment on Lots 7 and 8, Block 7.)

Do you recall such a meeting of the Board of Equalization, you being present? A. I do.

Q. I wish you would explain what was done and said by the members of the Council—what was said by the members of the Council at that time in regard to raising the assessors' assessment on Lots

(Testimony of Bartley Howard.)

7 and 8, Block 7, from \$6,000 to \$7,500?

Mr. DONOHOE.—*We* which we object on the ground that it is incompetent, irrelevant and immaterial and has no bearing on the case.

The COURT.—The objection will be sustained; you have introduced the record which shows the official action—the matter of how they arrived at it is not material.

Defendants allowed an exception to the ruling.

Q. You are familiar with real estate valuations in Cordova? A. To a certain extent.

Q. Do you know where Mr. Lathrop's property is, on Lots 24, 25 and 26 in Block 2?

A. I do.

Q. Will you give your opinion to the Court as to how much that property would be depreciated if Burkhart Alley is closed?

A. I wouldn't think it would be depreciated any.
[241—201]

Q. Do you know of any other alleys in the town of Cordova similar to Burkhart Alley between First Street and the regular Alley in Block 7?

A. Yes, a small alley, further down the street, that is between Tom Davidson's building and Slater's building, known as the Model Cafe.

Q. Is that in Block 7?

A. Yes—it runs from First Street to the alleyway at the rear end.

Q. Does anybody use that alley that wants to?

A. As far as I know.

Q. How wide is that alley?

(Testimony of Bartley Howard.)

A. About four feet.

Q. Is it roofed over? A. It is.

Mr. MEDLEY.—That's all.

Cross-examination.

(By Mr. DONOHOE.)

Q. In regard to that light you testified about that was placed in the alley in 1912—who paid for that light, the city? A. The city.

Q. The city paid for the light? A. Yes, sir.

Q. That was placed there in 1912?

A. In the fall of 1912; yes.

Q. And the light is there yet?

A. Yes, sir; the light is there yet.

Q. And during all that time, the city has paid for it? A. As far as I know they have.

Q. What was the special purpose of putting in that light—was it [242—202] not for the purpose of lighting Burkhart Alley?

A. Not altogether; the question was discussed in regard to lighting the rear of the alleyway, both ways, for the fire department, in case of fire.

Q. Do you know of any other place in the regularly laid out alleys where they maintain lights, where the city maintains lights?

A. No, I don't know that I do—there is a light at this particular time, we were requested to place a light at the end of what is known as Waterfront Street, I believe—it is not a full street there, full width, and to change a couple of lights or one light at the rear end of Mr. Lathrop's building, somewhere in there on the sidewalk—we maintained a

(Testimony of Bartley Howard.)

light in the middle of that block.

Q. It is a street?

A. Yes, it's a street; it is dedicated as a street, not as an alleyway.

Q. Do you think the City Council would have placed that light there in 1912 if it wasn't for the purpose of lighting Burkhart Alley?

A. I think if the same request was made by an individual or by the fire chief, coming before the Council and asking that a light be placed there, that the Council would consider something of that kind, for the protection of the property owners; it has been the intention of the property owners to do so.

Q. You want to be understood as testifying at this time that the light would have been put there if there had not been a Burkhart Alley to light up?

A. I would say that I have my doubts if there would have been a request made for it, and the City Council would not have taken action.

Q. You say Mr. O'Neill appeared before the Council? [243—203] A. Yes, sir.

Q. And the reason the city put in this light, he requested, he stated to the Council that he already had one end of the Burkhart Alley lighted?

A. Yes, sir.

Q. And he wanted the city to light the other end?

A. He wanted a light over the alleyway, yes—the Burkhart Alley and the regular alley.

Q. Did Mr. O'Neill say that he wanted the reg-

(Testimony of Bartley Howard.)

ular alley lighted for the fire department?

A. To get through that alleyway, he contended it was necessary.

Q. During the time you were on the Council, the Burkhart Alley was kept generally clear of stuff, so the fire apparatus could get through there?

A. As a general rule it was, not at all times.

Q. Those obstructions you spoke of were temporary in their nature?

A. Yes, sir; only temporary.

Q. Sometimes they pile stuff right out on the sidewalks,—you have seen that? A. Yes, sir.

A. And it might have remained a little longer in this alley because it was covered over?

A. Yes, sir.

Q. How long were you on the Council?

A. Four terms.

Q. Were you there in 1916? A. Yes, sir. ?

Q. Were you a member of the Council—did you attend the meeting on November 6, 1916?

A. I imagine I did; I never missed a meeting while I was a member. [244—204]

Q. I will read an extract from page 437 of Book One of the minutes of the Town Council of Cordova, as follows: It was reported that Burkhart Alley was in bad condition and it was decided that the owners should be notified to have it repaired. Do you remember of that action? A. Yes, sir.

Q. That action took place in the Council?

A. Yes, sir.

Q. And do you know if the owners were in-

(Testimony of H. A. Slater.)

structed to repair in pursuance of that resolution?

A. If I am not mistaken I notified Mr. Burkhart myself at the request of the street committee—it was his sidewalk in front of the alleyway on Second Avenue that was sloping toward the street, very steep and dangerous, and I notified Mr. Burkhart the next morning to raise it up.

(By Mr. MEDLEY.)

Q. This coal-box, was it a temporary obstruction or a permanent obstruction?

A. It was permanent while it was there. It was placed in the alleyway—it was movable.

The COURT.—It was a coal-box that could be removed? A. Yes, sir.

Q. How large was it?

A. If my memory serves me right, it was about two feet wide and something like 6 feet long, set out from the wall, about so high, about two feet high.

Q. Two feet wide, and six feet long?

A. Yes, sir.

Q. And the other stuff—

A. I happened to have occasion to go through there and noticed it [245—205] there on a few occasions, especially when Mr. Lund was changing the fronts for Mr. Slater and Mr. O'Neill, remodeling the building on the alleyway side.

(By Mr. DONOHUE.)

Q. How often did you see that box there?

A. I would say as often as I went through the alleyway during that winter—that is the only win-

(Testimony of H. A. Slater.)

ter I remember anything of the kind being maintained in there, except another time there was a small box on the other side maintained the same way, where they kept a small supply of coal.

The COURT.—All the obstructions you saw in there didn't prevent you going through?

A. Not at all. It was for the convenience of the occupants in the building.

Witness excused.

Whereupon court adjourned until to-morrow (Saturday) morning at 10 o'clock. [246—206]

Saturday, December 13, 1919.

MORNING SESSION.

Testimony of H. A. Slater, in His Own Behalf (Recalled).

H. A. SLATER, one of the defendants, recalled.
(By Mr. MEDLEY.)

Q. Mr. Slater, state whether or not there is an awning in front of that building on Lot 7, Block 7.

A. There is an awning goes across from Lot 7 to Lot 8, takes in the alley, also goes right straight acrossed, one awning.

Q. An awning paid for by the property owners?

A. Yes, sir.

Q. Fronting the alley on First Street?

A. Yes, sir.

Q. How long has that alley been up there?

A. It was put up shortly after Mr. O'Neill and I came in there.

Q. In 1912? A. In 1912 or 13.

(Testimony of H. A. Slater.)

Q. And has been used continuously ever since?

A. Yes, sir.

(By Mr. DONOHOE.)

Q. How high is that awning above the sidewalk on First Street?

A. I don't know just how high it is.

Q. Nine or ten feet?

A. Something like that.

Q. And a portion of the time it is pushing back against the wall of the building? A. Yes, sir.

Q. And when in position it in no way interferes with the sidewalk or foot travel going through Burkhart Alley? A. No, sir.

Witness excused. [247—207]

Mr. MEDLEY.—We offer in evidence this certified extract of the minutes of the Common Council of the town of Cordova.

Mr. DONOHOE.—The defendant objects to it on the ground that it is incompetent, irrelevant and immaterial. The offer seems to cover some action that took place in the Council since this suit was brought, in which Mr. Lathrop moved that the city clerk be instructed to intervene in behalf of the city in this case. There was no second to the motion and it was lost. I don't see how that has any bearing whatever upon this case.

The COURT.—What is the purpose of it?

Mr. MEDLEY.—The purpose is to show that the City Council has not accepted the alley in any way. I understand that one of the theories of the plaintiffs is that this alley may become a street in three

ways, by an express dedication or by a common-law dedication or by a proscriptive use. In all processes of dedication there must be an acceptance by the city and this is evidence that the city did not accept any dedication, common law or express.

The COURT.—The offer will be denied.

To which ruling of the Court counsel for defendants is allowed an *acceptance*.

DEFENDANTS REST.

Mr. DONOHOE.—The plaintiffs move to reopen their case for the purpose of introducing the deposition of M. Finklestein, a witness whose testimony was taken by the defendants and has not been introduced and also to put in the testimony of two short witnesses. Part of the evidence may be rebuttal or it may be in the main case—I don't know how the Court will look upon it.

Mr. GRAHAM.—We object to the case being reopened for the purpose of putting in testimony, the purpose of which is not apparent [248—208] and not made known to the Court. As far as the deposition is concerned, we have no objection to the reopening of the case for that purpose, but as to witnesses entering upon a line of testimony which may or may not be rebuttal, I do not think the case should be opened for that purpose.

Mr. DONOHOE.—The testimony of these witnesses is this: To show that the regular alley running north and south through Block 7 is not planked and is not fit to be used for foot-passengers and is not so used by pedestrians and for four or five months of the year it is blocked with snow so that

it cannot be used by pedestrians for travel. The reason we did not offer this testimony before is this: To the original complaint the defendants filed a demurrer that it did not state facts sufficient to constitute a cause of action. We amended our complaint and alleged specific acts of damage and the defendant did not move against those acts but denied them and we naturally believed that that issue was left on the pleadings, but since the case has taken the turn it has, we desire to show that this plaintiff Alice Johnson has no egress by means of the regular alley and we want to put witnesses on the stand to clear up that issue.

The COURT.—I think you should be confined to rebuttal. The motion to reopen the case for the purpose of putting in the deposition is granted.

Plaintiffs allowed an exception to the ruling.

Mr. DONOHOE.—I will now offer the deposition of Mr. Finklestein. [249—209]

Mr. DIMOND.—I will now read the deposition of Mr. Finkelstein.

In the District Court for the Territory of Alaska,
Third Division.

No. C-173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA,
Defendants.

Stipulation Re Deposition of M. Finkelstein.

It is hereby stipulated and agreed by and between the parties, plaintiffs and defendants, in the above-entitled action, by and *and* through their respective attorneys of record, that the deposition of M. Finkelstein, a witness upon behalf of defendants, may be taken upon written, direct and cross-interrogatories to be propounded to said witness at the time of taking said deposition, by the officer before whom said deposition may be taken; that said deposition may be taken before any person authorized under the laws of the State of Washington to take depositions, at such time or times as such person may fix therefor, provided said deposition shall be taken not later than October 15, 1919, and immediately mailed to the clerk of the District Court, Cordova, Alaska.

It is further stipulated that said deposition when taken and reduced to writing and certified by said notary public or person authorized to take depositions and filed in the court may be read by either parties in evidence at the trial of the above-entitled cause, or at any retrial thereof, with the same force and effect as if said witness appeared at said trial in person and orally testified.

It is further stipulated that each of the parties reserve all legal objections to the testimony given by said witness and all objections to the form of the interrogatory or cross-interrogatory and may interpose any and all legal objections to said testimony and to the competency, relevancy and mate-

riality of any direct interrogatory or cross-interrogatory or any answer thereto at the time the said deposition is offered in evidence, whether said objections appear from said deposition to have been made at the time of the taking of the same or not.

It is further stipulated and agreed that all objections as to the manner of certifying said deposition and transmitting same to the clerk of the Court is hereby waived so long as it appears from said deposition and the certificate of the notary, or person authorized to take depositions, attached thereto, that the witness was duly sworn before testifying and that the testimony contained in said deposition was given by said witness in accordance with this stipulation.

Dated at Cordova, Alaska, this 7th day of October, A. D. 1919.

DONOHOE & DIMOND,

By T. J. DONOHOE,

Attorneys for Plaintiffs.

EDWARD F. MEDLEY,

B. O. GRAHAM,

Attorneys for Defendants. [250—210]

Deposition of M. Finkelstein, for Defendants.

BE IT REMEMBERED, that pursuant to the stipulation hereto annexed, and on the 14th day of October, 1919, at the hour of two o'clock P. M. of said day, at the office of Lyons & Orton, in the Alaska Building, Seattle, Washington, before me, Thomas R. Lyons, a notary public in and for the State of Washington, duly appointed and commissioned to administer oaths, personally came M.

(Deposition of M. Finkelstein.)

Finkelstein, a witness produced on behalf of the defendants in the above-entitled action, who being by me first duly sworn to tell the truth, the whole truth and nothing but the truth in said cause, then and there testified and answered the hereto attached interrogatories and cross-interrogatories as follows:

Direct Interrogatories.

Int. No. 1. State your name, age and residence.

A. M. Finkelstein; age, 53; I call Cordova my home, but I am there six months and here six months.

Int. No. 2. State whether or not you are now or ever have been a resident of the town of Cordova, Alaska; and if you state that you are now or ever have been a resident of said town, state between what years you lived in said town.

A. Yes, I have been a resident of the town of Cordova, Alaska; I have lived there since 1907. I have been out of there, in the States, several times on business trips and visits, but my business and home were in Cordova, Alaska, during all of this time.

Int. No. 3. State whether or not you ever were the owner of Lot 26 in Block 7 of the town of Cordova, Alaska; and if your answer is in the affirmative, state when and from whom you purchased said lot.

A. Yes, I was the owner; I purchased it from the Cordova Townsite Company, from the trustee of the townsite of Cordova. [251—211]

Int. No. 4. State whether or not, during the time

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you were the owner of Lot 26, in said Block 7, a building was erected on Lot 7 in said Block 7; and if you answer this question in the affirmative, state when and by whom such building was erected.

A. Well, there was no building there at the time I purchased my lot No. 26, but during the time that I owned Lot 26, there was a building erected on Lot 7, Block 7, by Robert Ashland.

Int. No. 5. State whether or not you know that a building was erected on Lot 8 of said Block 7, adjoining said lot 7 on the south; and if your answer is in the affirmative, state when and by whom the building on said Lot 8 was erected?

A. Well, I do not know just who built those buildings; I know Mr. Burkhart was one of them; I think it was Mr. Burkhart and Mr. Barber—but I am not sure.

Int. No. 6. State whether or not the buildings erected on said Lots 7 and 8 were so constructed, when erected, that the buildings on said lots joined at the dividing line between said lots?

A. They joined at the second story—there was a space between the buildings at the first story, but they joined at the second story.

Int. No. 7. If your answer to the preceding question is in the affirmative, state whether or not a hall-way between the buildings on said Lots 7 and 8 was left on the ground floor at the time said buildings were erected. A. Yes, sir.

Int. No. 8. If you have stated that such a hall-way was made when said buildings were erected,

(Deposition of M. Finkelstein.)

state the approximate width and height of said hallway, and how much each of said lots 7 and 8 was occupied by said hallway.

A. The hallway was about eight feet wide and about twelve feet high, and about four feet of each lot was occupied by such hallway. [252—212]

Int. No. 9. State whether or not you know who the owners were of Lot 25 in Block 7 and Lots 7 and 8 in said block at the time the buildings were erected on said lots 7 and 8. For your guidance in answering this question you are informed that Lot 26, Block 7, is in the rear of Lot 7, Block 7, but facing on Second Avenue, while said Lots 7 and 8 in Block 7, face on First Avenue of said town of Cordova.

A. Yes, I know the owners.

Int. No. 10. If your answer to the preceding question is in the affirmative, state who were the owners of Lot 25 in Block 7 and Lots 7 and 8 in said block, at the time the buildings were erected on said Lots 7 and 8.

A. Well, Lot 25 and Lot 8 belonged to Burkhart and Barber together, and lot 7 belonged to Robert Ashland.

Int. No. 11. The plaintiffs in the above-entitled case, in Paragraph VI of their Amended Complaint, allege:

“That in the summer of the year 1908 Lot No. 7 in Block No. 7 of the said Town of Cordova was owned by Robert Ashland; Lot No. 8 in Block No. 7 was owned by A. E. Burkhart; Lot No. 25 in Block No. 7 was

(Deposition of M. Finkelstein.)

owned by A. E. Burkhart; Lot No. 26 in Block No. 7 was owned by M. Finkelstein. That at said time the owners of said lots were about to erect buildings on their respective lots and they then and there orally agreed to open an alley eight feet wide from First Street to Second Street in said Town of Cordova, the centre of said alley running along the dividing line between Lots Nos. 7 and 8 and Lots No. 25 and 26 in Block 7 of the said Town of Cordova. That the then owners of Lot 7 and Lot 26 in Block 7 gave four feet of their said lots along the southerly side thereof for said alley and the then owners of Lots 8 and 25 of said Block 7 gave four feet along the northerly side of their said lots for said alley. That said alley thereupon became known and ever since has been known and called Burkhart Alley. That shortly after said agreement the owners of the said four lots, heretofore described, erected buildings on their said respective lots, the side walls of said buildings being four feet from the side line of said lots, thus leaving a public way eight feet wide from First Street to Second Street; that when the owners of said lots erected buildings on their respective lots, they made various and many entrances into said buildings from Burkhart Alley and in all manner treated said Burkhart Alley as a [253—213] public highway. At the time said alley was opened up it was agreed between the owners of said four lots

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that the four foot strip given by A. E. Burkhardt for said alley along the northerly side of Lot 25, about 18 inches thereof should be used for the walk following the grade of the alley, and the remaining $21\frac{1}{2}$ feet should be used for higher walks not following the grade of the alley but on the levels of the floors of the buildings erected on said Lot 25 so that the occupants in the apartments of said buildings might conveniently reach the same from said alley."

State whether or not any conversation was had between the owners of said four lots, at or prior to the time said buildings were erected, concerning the manner in which said buildings should be constructed.

A. Yes, we had some conversation about the matter.

Int. No. 12. If in answering the last question you have stated that there was any conversation between the owners of said four lots at or prior to the construction of said buildings, state who was present during such conversation when said conversation occurred, as nearly as you can determine, and what was said by the owners of said four lots concerning the manner in which said buildings should be erected.

A. We all had an understanding that the buildings should be so erected as to leave an eight-foot alleyway—that there should be such an alleyway between the buildings for our use. I do not now recall the details of the conversation, but the sub-

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stance of it I have stated. I do not remember who was present at such conversation.

Int. No. 13. State whether or not, at or prior to the time said buildings were erected, there was ever any conversation between the owners of said four lots, relative to opening an alley eight feet wide from First Street to Second Street in said town of Cordova, with the centre of said alley running along the dividing line between Lots 7 and 8 and between Lots 25 and 26 in Block 7 of [254—214] said town of Cordova, and if your answer is in the affirmative, state what was said and by whom.

A. Yes, there was something said, but I do not now remember what arrangements were made, but such conversation amounted to an agreement between all of the owners of said lots that an alleyway would be extended from First to Second Avenues along the dividing line between Lots 7 and 8 and between Lots 25 and 26, in Block 7, but it is now impossible for me to state just what each party or any of the parties said.

Int. No. 14. State whether or not, at or prior to the time said buildings were erected, there was ever any conversation between the owners of said four lots, relative to the owners of Lot 7 and Lot 26 in said Block 7 giving four feet of their said lots along the southerly side thereof for such alley, or the then owners of Lots 8 and 25 in said block giving four feet along the northerly side of their said lots for said alley, and if your answer is in the affirmative, state what was said and by whom, and who was present at the time.

(Deposition of M. Finkelstein.)

A. Yes, there was an understanding that there should be an alleyway left between the buildings and that each party should give up about four feet for such alleyway. I do not remember who was present, and I do not remember the details of the conversation.

Int. No. 15. State whether or not, at or prior to the time said buildings were erected, there was over any conversation between the owners of said four lots relative to A. E. Burkhart leaving about eighteen (18) inches of the northerly four feet of said Lot 25 to be used for a walk following the grade of said so-called alley, and the remaining two and one-half ($2\frac{1}{2}$) [255—215] feet of the northerly four feet of said Lot 25 being used for higher walks not following the grade of said so-called alley, but on the levels of the floors of said buildings erected on said Lot 25 to enable the occupants of the apartments of such building to reach the same from said so-called alley; and, if your answer is in the affirmative, state what was said and by whom, and who was present at the time.

A. I do not remember anything about that at all.

Int. No. 16. State whether or not at any time when you were the owner of said Lot 26, Block 7, there was ever any conversations between the owners of said four lots, or any of them, at which you were present, relative to making said so-called Burkhart Alley a public highway, or a public alley, street or thoroughfare; and if your answer is in the affirmative, state what was said, by whom, who was

(Deposition of M. Finkelstein.)

present at the time, and approximately at what time said conversation occurred.

A. Positively not; it was not for a public alley-way at all, but strictly for our own convenience, to get to our buildings more easily.

Int. No. 17. State whether or not, at the time you erected the building on said Lot 26, Block 7, you intended to dedicate the four feet of the south-erly side of said lot to the public use as a highway.

A. No, I did not.

Int. No. 18. State whether or not, at the time you erected the building on said Lot 26, Block 7, you intended to retain control, dominion and pos-session of the southerly four feet of said lot.

A. Yes, I did.

Int. No. 19. State whether or not any conversa-tion was had between [256—216] the then owners of said four lots at or prior to the time of the erec-tion of the said buildings thereon, relative to the right of any or all of the owners of said four lots to close or otherwise prevent the use of their respec-tive portion of said so-called alley?

A. Yes, there was something said about it.

Int. No. 20. If you answered the last interroga-tory in the affirmative, state when such conversation occurred, as near as you can determine the time, who was present, and what was said and by whom.

A. I do not remember who was present, but we were all together at the time—it was in the spring of 1908. Well, we agreed to close the alley any time we saw fit. That was the understanding. The

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alley was simply for our own convenience, and we could close it if we wanted to.

Int. No. 21. State whether the plank foot-walk crossing the regular alley running north and south through said block and which connects that part of the so-called Burkhart Alley between said Lots 7 and 8 and that part thereof between Lots 25 and 26 was constructed or maintained by the town of Cordova or by the owners of said lots.

A. By the owners of said lots. The town of Cordova never did anything towards the maintaining of the alleyway as long as I owned the building—the owners of the buildings kept up the alleyway.

Cross-interrogatories.

Cross-Int. No. 1. Do you at this time own Lot 26, Lot 25, Lot 7 or Lot 8, in Block 7, of the town of Cordova, Alaska, or any interest in said lots or either of them. [257—217]

A. No.

Cross-Int. No. 2. State when you erected the building on Lot 26 in Block 7, of the Town of Cordova, Alaska.

A. In the spring of 1908.

Cross-Int. No. 3. Did you commence your residence in the Town of Cordova, Alaska, in the summer of 1908, and have you been a resident of said place ever since?

A. I commenced my residence in Cordova, Alaska, in 1907, and have lived there ever since.

Cross-Int. No. 4. It is a fact, is it not, that when you erected the building on Lot 26, in Block 7, in 1908,

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you constructed the south wall of said building four feet north of the south line of said lot, thereby leaving an alleyway four feet wide off the southerly side line of Lot 26, and when Burkhart and Barber erected the building on Lot 25, in Block 7, they constructed the north wall of said building four feet south of the north line of said lot thereby leaving four feet for an alleyway, except as the same was occupied by a high walk along the floor level of this building? A. Yes.

Cross-Int. No. 5. It is a fact, is it not, that when Robert Ashland constructed his building on Lot 7 in Block 7, town of Cordova, Alaska, he constructed the south wall of said building four feet north of the south line of said lot, thereby leaving four feet of the southerly side of said lot for an alleyway and when A. E. Burkhart constructed the building on Lot 8 in Block 7, he constructed the north wall of his building four feet south of the north line of said lot, thereby leaving four feet for an alleyway and this made an eight foot alleyway between the buildings on Lot 7 and the building on Lot 8 in Block 7? [258—218]

A. Yes.

Cross-Int. No. 6. It is a fact, is it not, that in 1908, after the buildings had been erected on the four lots bordering on Burkhart Alley, there was an open alley eight feet wide, excepting that part occupied by a high walk along the building on Lot 25, from First Street to Second *Second*, through and over which the general public traveled every day? A. Yes.

Cross-Int. No. 7. It is a fact, is it not, that from

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the time Burkhart Alley was opened up for public travel in the year 1908, until defendant Slater closed a portion of it in September, 1919, this alley was continuously used as a public street or alley and the general public passed through and over it without permission from anyone and without anyone attempting to hinder them in any manner from so using it?

A. Yes.

Cross-Int. No. 8. It is a fact, is it not, that during the time you were the owner of Lot 26 in Block 7, you did not do any act to prevent the general public from the free use of Burkhart Alley as a public street or alley and did not in any manner attempt to prevent it being used as a public highway?

A. It is; I never sought to prevent anyone from using the alleyway as long as I owned the building.

Cross-Int. No. 9. It is a fact, is it not, that when you commenced business in the building on Lot 26 in Block 7, and during all the time you were engaged in business there, you considered it an advantage to have Burkhart Alley open as a public highway and to have the public use it freely as a highway?

A. Yes.

Cross-Int. No. 10. Did you not in the town of Cordova, Alaska, in [259—219] the month of September, 1919, have a conversation with T. J. Donohoe, one of the attorneys for plaintiff in this action, regarding Burkhart Alley, in which you stated to the said Donohoe that there was no written agreement between the owners of the four lots bordering on Burkhart Alley in regard to whether the same should be a

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public thoroughfare or not and in this conversation in response to a question asked you by the said Donohoe regarding any oral agreement the said owners made at the time of opening up said Burkhart Alley, did you not state, "I cannot remember what the oral agreement was; it was so long ago"?

A. That is right; I think I had such a conversation; I do not remember what the oral agreement was.

Cross-Int. No. 11. If in your direct examination you state that it was agreed between the owners of the said four lots bordering on Burkhart Alley, that any one of the owners of any of said lots might close his portion of said alley at any time he feels fit, I will ask you if it was not agreed that at the time Burkhart Alley was opened up and at the time you built your building on Lot 26 in Block 7, that Burkhart Alley could not be closed nor any part of it closed to the public except by the consent of all the owners of the four lots bordering on said alley?

A. I do not remember any such understanding.

Cross-Int. No.12. If this was not the agreement, what advantage would you gain for the four feet along the southerly line of Lot 26, which you left for an alleyway?

A. Well, we just simply gained by getting to our buildings more easily than by going around the block; that is what we gained.

Cross-Int. No. 13. Would Burkhart Alley be of any advantage to a business conducted on Lot 26 or on Lot 25 of Block 7, if the westerly end of said alley was closed where it passes over Lot 7. [260—220] and Lot 8, in Block 7? A. No, sir.

(Deposition of M. Finkelstein.)

Cross-Int. No. 14. Would you have given four feet off the southerly side of Lot 26, in Block 7, for this alleyway if Burkhart or Ashland had reserved the right to close the alley where the same passes over the southerly four feet of Lot 7 and the northerly portion of Lot 8? A. No, sir.

Cross-Int. No. 15. Was not Burkhart Alley opened up as a public highway in 1908 because you wanted to be on a street corner with your clothing business on Lot 26 and Ashland wanted to be on a street corner with his saloon business on Lot 7 and Burkhart wanted to be on a street corner with his business on Lot 8 and Burkhart also wanted a street or alley running along the Burkhart Apartment in the building on Lot 25?

A. Why, yes, that is why we left the alleyway; we could get to our buildings more easily; it was for our convenience.

(Signed) M. FINKELSTEIN.

State of Washington,
County of King,—ss.

I, Thomas R. Lyons, a notary public in and for the State of Washington, do hereby certify that the witness in the foregoing deposition, named M. Finkelstein, was by me, on the 14th day of October, 1919, sworn to tell the truth, the whole truth and nothing but the truth in said cause, and after being by me duly sworn, the written interrogatories and cross-interrogatories hereto annexed were propounded to him by me, and the answers taken, in accordance with the stipulation to take testimony, hereto annexed; that said answers were

reduced to writing by B. B. Dearborn, a qualified stenographer, and when completed were carefully read by said witness, and being by him corrected, [261—221] were subscribed by him in my presence.

WITNESS my hand and notarial seal this 14th day of October, 1919.

[Notarial Seal] THOMAS R. LYONS,
Notary Public in and for the State of Washington,
Residing at Seattle.

My Commission expires September 22, 1922.

Mr. DONOHOE.—I want to recall Miss Johnson, in rebuttal. [262—222]

REBUTTAL.

Testimony of Alice Johnson, in Her Own Behalf (In Rebuttal).

ALICE JOHNSON, one of the plaintiffs, recalled as a witness in her own behalf, in rebuttal, testified as follows:

Direct Examination.

(By Mr. DONOHOE.)

Q. Miss Johnson, you reside, do you not, in the basement portion of the building on Lot 25, in Block 7, of the town of Cordova? A. Yes, sir.

Q. How long have you resided there?

A. About a year and six months.

Q. Have you had occasion since you have resided there to notice the condition of what is termed the regular alley running north and south through Block 7 of the town of Cordova? A. Yes, sir.

Q. That alley separates your building from the building on Lot 8 in Block 7, does it?

(Testimony of Alice Johnson.)

A. Yes, sir.

Q. And separates Lot 26 from Lot 7 in Block 7?

A. Yes.

Q. Is there any sidewalk on that alley?

A. No, sir.

Q. There is no sidewalk leading south towards B Street or north towards C Street? A. No, sir.

Q. Is that alley paved? A. No, sir.

Q. What is the condition of that alley during the winter-time?

A. It is in very bad condition during the winter and in the summer it is bad also.

Q. What is its condition in winter as to snow accumulating in it?

Mr. MEDLEY.—We object to that. [263—223]

Objection overruled; defendants allowed an exception.

A. Well, it is piled very high with snow, so nothing can get through —the teams can hardly get through.

Q. How is that?

A. It is piled with snow during the winter and no one can hardly get through and teams can hardly get through.

Q. Does the pedestrian or foot travel of the town of Cordova use that alley for travel at any time?

A. Very little.

Q. Is it in such a condition that it could be used for public travel or foot-passengers? A. No, sir.

Mr. GRAHAM.—We object as leading and move to strike the answer.

Objection sustained and motion granted.

(Testimony of Alice Johnson.)

Q. What is the condition of that alley in the summer-time as to being used for foot travel?

A. Well, it is used a little but it is usually sloppy and wet in there, in lots of places.

Q. The parties that use the alley at all in the summer-time, how do they reach the alley?

A. Some through the Burkhart Alley and some from this street and some from the other street.

Q. What is the condition of the alley as to whether or not there are obstructions or garbage of any kind in the alley?

Mr. GRAHAM.—We object as improper and immaterial.

The COURT.—Objection sustained.

Mr. DONOHUE.—That's all. [264—224]

Cross-examination.

(By Mr. MEDLEY.)

Q. Do you know whether any of that public alley has been paved? A. Not that I know of.

Q. You don't know of it? A. No, sir.

Q. Have you noticed it lately?

A. I haven't been through the alley lately.

Q. Did you ever look from the direction of your house towards B Street, down the alley, or C Street, when you come out of your house?

A. There is a walk just in the back of the Horse-shoe Building.

Q. Part of it is paved?

A. It is a board walk; yes.

Q. How is it constructed?

A. It is constructed for the teams.

(Testimony of Alice Johnson.)

Q. What do you mean, for the teams?

A. I think it is about a year ago—it was in awful bad shape, and Mr. Finklestein reported it to the City Council and they fixed it the next week.

Q. The city fixed it? A. Yes, sir.

Q. The city made the repairs on the public alley?

A. Yes, sir.

Q. Do you know how much of it they paved?

A. Just in front of the Horseshoe building, that is, in the rear of the Horseshoe building.

Q. And on Mr. Finklestein's building?

A. No, sir.

Q. About 50 feet? A. Just about 50 feet.

[265—225]

Q. Do the teams use that alley all the winter long?

A. All the teams that come through use it.

Q. Does the public scavenger use that alley all winter long with his team? A. Yes, sir.

Q. Doesn't Mr. Finklestein or his firm use the alley that way, their teams, for delivery?

A. Sometimes.

Q. All the year round?

A. Sometimes I don't see them for a week or more.

Q. Now, Miss Johnson, how many people have residences fronting on that alley?

A. I really don't know.

Q. Do you know whether there are any?

A. Yes, I guess there is a few—my part of it is on that alley.

Q. Those people in there would have to use the alley to get in and out of their houses? A. Yes, sir.

(Testimony of Alice Johnson.)

Q. Were you familiar with the alley at the time the postoffice was in the Ostrander Building?

A. Yes, sir.

Q. Do you know whether the city kept the alley free of snow so that mail could be delivered?

A. I don't know.

Q. You are not familiar with that? A. No.

Q. Do you know where the mail was delivered from the boats to the postoffice?

A. I never noticed that.

Q. You don't know whether it was delivered through the alley or not? A. No, sir. [266—226]
(By Mr. DONOHUE.)

Q. This pavement is just planks laid down where there is rather a deep point or coulee?

A. Yes, sir.

Q. Put down to enable *to* teams to go over that coulee? A. Yes, sir.

Q. That is the only pavement in the alley?

A. That is all I noticed.

(By Mr. MEDLEY.)

Q. What is a coulee?

A. It is very low and a very bad place.

Q. Do you understand that there is any open space underneath the planking or the planking is in a roadbed?

A. I judge there is about two feet of space under the planks.

Q. Can you testify there is two feet of space under the planks? A. No.

Q. You don't know? A. I don't know positive.
Witness excused. [267—227]

Testimony of A. E. Lathrop, in His Own Behalf (Recalled in Rebuttal).

A. E. LATHROP, one of the plaintiffs, recalled, as a witness in his own behalf, in rebuttal, testified as follows:

Direct Examination.

(By Mr. DONOHOE.)

Q. I believe you testified in your direct examination that you had been in the transfer business for a number of years in the town of Cordova?

A. Yes, sir.

Q. Commencing what year? A. 1908.

Q. Were you the occupant of the building on Lots 5 and 6 in Block 7 of the town of Cordova for a number of years? A. Yes, sir.

Q. That building abuts, the front of the building, on First Avenue and the rear of the building abuts on the regular alley running north and south through Lot 7, Block 7? A. Yes.

Q. Are you familiar with the regular alley running north and south through Block 7? A. I am.

Q. And have you been familiar with that alley since 1908?

A. Since 1908, up to the time I sold the Transfer Company; I haven't paid much attention to the alley in the last year or two, since I have been here.

Q. You were somewhat familiar with the alley in the vicinity of the rear of the building on Lots 7 and 8 until this summer when you gave up the lease on that property? A. Yes, sir.

Q. Is there any sidewalk through this alley?

(Testimony of A. E. Lathrop.)

A. No, none I know of.

Q. You would know it if there was one? [268—228]

A. I am positive there is no walk unless a short piece of walk leading from Burkhart Alley into the rear door of Harwood's—I don't know of any other walk from the alley.

Q. You don't know that there is such a walk there as that, do you?

A. I think it is an outlet from the back of his building; I know he has a back door; I have never been through there.

Q. Is that a plank walk to get teams over or a sidewalk for foot-passengers?

A. That is for people, not for teams, the walk I am speaking of, that leads from the rear of Harwood's, from his door to the alley.

Q. To the Burkhart Alley? A. Yes, sir.

Q. And it stops at Harwood's back door?

A. Yes.

Q. How far is that from Burkhart Alley?

A. One lot, 25 feet.

Q. Do you know whether the regular alley that runs north and south through Block 7 of the town of Cordova is used by the traveling pedestrians of the town of Cordova as a means of travel—do you know that it is or not?

A. It is not used only by—there are a few cabins, two or three cabins on the side of the alley; those people make use of it. But the traveling public don't use the alley.

(Testimony of A. E. Lathrop.)

Q. How do they get to the alley—those people that travel there?

A. Through the Burkhart Alley and occasionally from the Ostrander end, from C Street.

Q. What is the width of that alley?

A. I think it is 14 feet.

Q. Is the west side of the alley, that is, the side next to First [269—229] Avenue entirely built up with buildings? A. It is.

Q. Most of those buildings are two-story buildings?

A. Most of them are, and run to the alley.

Q. And the buildings extend from the regular alley 100 feet to First Street? A. Yes, sir.

Q. How is the slope of the roof of those buildings? A. All the watersheds are to the alley.

Q. And in time of rain, the rainy season, where is the rain that accumulates on the roof of those buildings deposited?

A. Runs off into the alley.

Q. Is the same true when we have thawing weather in the winter-time? A. Yes, sir.

Q. And what becomes of the snow that accumulates on the roofs of these buildings during the winter-time?

A. It is shoveled off into the alley.

Q. And what condition does that leave the surface of the alley in the winter-time in regard to snow? A. It is impossible to get through.

Mr. GRAHAM.—I move to strike out this testimony in regard to the drains from the roof run-

(Testimony of A. E. Lathrop.)

ning into the alley and snow accumulating in the alley for the reason that it is a public alley and if there is occasion to travel it and have it open, it is the duty of the public of the town of Cordova to keep it open; it is the same as any other alley.

The COURT.—Motion denied and exception allowed. It goes to the question of user of the alley, which is a question here.

Q. Describe the condition of the alley in the winter-time in reference to the amount of snow in that portion of the alley north [270—230] of the Burkhart Alley up to C Street—what is the condition of the snow there?

Mr. GRAHAM.—We object to that as incompetent, irrelevant and immaterial.

Objection overruled; defendants allowed an exception to the ruling.

A. I am speaking now from years of experience—

Mr. MEDLEY.—Answer the question.

The WITNESS.—(Continuing.) Not days but weeks and sometimes months it has been impossible—

Mr. MEDLEY.—I object to this form of answer.

The WITNESS.—(Continuing.) It has been impossible to put teams through there for weeks.

Q. Is that condition quite general during the winter months of each year?

A. Winters we have considerable snow.

Q. When you were occupying the premises on Lots 5 and 6 in Block 7, did you ever have occasion to shovel snow off the roof of that building?

(Testimony of A. E. Lathrop.)

A. Yes, sir.

Q. And where did you deposit that snow?

A. In the alley.

Q. And would that raise the surface of that snow in that alley any higher than it would be back of Clayson's building.

A. Yes, ten or fifteen feet, back of those buildings that extend to the alley. Clayson's building, I believe, is only about 80 feet, which leaves a space to throw the snow off, without throwing it into the alley.

Q. Then it would make, the one much higher and the other places much depressed? [271—231]

A. Yes, sir.

Q. Did you, while you were in the transfer business, have the contract for hauling the United States mails to the postoffice in the Ostrander building? A. Yes, sir.

Q. You remember the question put to Miss Johnson about the alley, and delivering mail to the Ostrander Building—can you describe that situation to the Court?

A. The city never kept any alley open for me to handle the mail and I have handled the mail ever since it was handled in this town.

Q. The Ostrander Building is how far from C Street?

A. The Ostrander Building is 60 feet deep, I believe—60 feet wide and 100 feet deep.

Q. In delivering this mail to the Ostrander Building, how did you travel?

(Testimony of A. E. Lathrop.)

A. I used the vacant space to the rear of Clayson's store and made a turn around there.

Q. How far down the alley did you come from C Street?

A. Came down the full width of the building; that is where I delivered the mail—then I drove beyond the building, in the open there.

Q. How far south on the alley did you travel from C Street when you delivered your mail—in getting your teams out? A. About 100 feet.

Q. Did that take you anywhere close to the Burkhart Alley? A. No.

Mr. GRAHAM.—This is all according to past conditions when the postoffice was in the Ostrander Building; that has nothing to do with whether the alley will be used in the future or not.

Mr. DONOHOE.—I will withdraw the question.

Q. Now, calling your attention to the condition of the alley, from [272—232] Burkhart Alley south to B Street, what would you say as to the condition of that alley in the winter-time, so as to be able to utilize it for pedestrians or foot travel—south from the Burkhart Alley toward B Street?

A. It all depends on the winters—there are many weeks that we are never able to use the alley.

Q. From your experience, do you know the length of Block 7? A. Not offhand; no.

Mr. DONOHOE.—That's all.

Cross-examination.

(By Mr. GRAHAM.)

Q. Teams never travel on Burkhart Alley, east

(Testimony of A. E. Lathrop.)

and west? A. No.

Q. Then that would make no difference, the closing of Burkhart Alley, with reference to the access to Miss Johnson's property by teams?

A. By teams—no.

Q. The only difference would be by foot-passengers? A. By foot-passengers.

Q. For foot-passenger travel, from the rear end of the Burkhart Flats, on to either B or C Streets, it is not possible to make a path through there in the winter-time, so persons could travel?

A. No, it is impossible.

Q. It is no more impossible than in other alleys of the town that are filled up?

Q. You asked if it was impossible. It is not impossible; after there was a great accumulation of garbage we would shovel and haul through the snow there to let a double-ender or snowsled in and get the garbage out. I have delivered coal—
[273—233]

Q. I am speaking of foot-passengers, not team traffic.

A. Well, they could use this road that was used by the garbage-man, after it was shoveled out.

Q. Suppose the garbage-man didn't go in there at all; isn't it practicable for a path to be kept through there so people could walk through, in the winter-time?

A. It is simply impossible to get through that alley in the winter-time, unless you do shovel.

Q. The same would be true in any other alley,

(Testimony of A. E. Lathrop.)

when the snow is deep, wouldn't it?

A. Certainly, only more so in this case.

Q. They have to shovel on Burkhart Alley, that part not covered over with buildings, to get through in the winter-time when heavy snow is falling?

A. Yes, they have to shovel.

Q. It is practicable also for the city, the town of Cordova, to put a walk along this public alley that runs north and south, and put a shed over that walk, isn't it, roof it over, the same as the Burkhart Alley is roofed over?

A. They certainly can do those things; yes.

Q. And they can put it in just as good shape for foot-travel if there is any justification for it, any travel there, in the winter-time, as the Burkhart Alley is now, through those buildings?

A. They can do those things but cities don't do those things in this country.

Q. Does the City Council object to throwing snow into the alley, off your building?

A. They object to throwing snow in the alleys off all the buildings—one council did that. [274—234]

Q. Hasn't the council insisted on keeping that alley open—was there objection on account of fire risk?

A. They *certain* did and that wasn't always done.

Q. Then you maintain that all these property owners have a right to blockade the public streets with snow off of their buildings?

A. No, I don't maintain they have but there must

(Testimony of A. E. Lathrop.)

be a place to dispose of this snow and the alley is the logical place; they can't put it over in the main street and it must go into the alley.

Q. Then you maintain you have the right to blockade the public streets and alleys with snow off of your buildings?

Mr. DONOHUE.—We object to that.

Mr. GRAHAM.—I will withdraw the question.

Q. The reason, then, that this alley running north and south through Block 7 is blockaded in the winter-time is due to the fact that the property owners shovel the snow off the roofs of their buildings into the alley? A. Not altogether.

Q. Very materially?

A. There is no travel, no justification for travel there—to keep this alley open.

Q. There has been no reason in the past why it should be kept open for foot travel?

A. I am talking about teams.

Mr. GRAHAM.—I suggest that we confine ourselves to foot travel because Burkhart Alley has never been used by teams and cannot be used for teams, so we should be confined to foot travel—I want to confine my questions along that line.

Q. A very material portion of the obstruction of that north and south alley has been due to property owners shoveling snow off the roofs of their own buildings into that alley? [275—235]

A. There is no question but that that had a great deal to do with it.

Q. And if it were not for the fact that the

(Testimony of A. E. Lathrop.)

property owners shoveled the snow off of the roofs of their own buildings into that alley, it would be practicable to keep it open?

A. That is a roundabout way to get anywhere.

Q. That is another question. We are getting at the practicability of using that north and south alley for foot-passengers instead of the Burkhart Alley?

A. It is not impossible to use any alley.

Q. I say practicable—it would be practicable to keep it open for foot travel if the property owners were not permitted to shovel the snow off of those buildings into the alley—isn't that a fact?

A. If the property owners were not permitted to shovel snow off the buildings into the alleys there would be no buildings.

Q. Answer the question.

A. That is the only way we can dispose of the snow.

Q. If the property owners were required to haul that snow away after they shoveled it off there—

A. That can be done.

Q. Now, take either supposition you want to—whether the property owners are prohibited from shoveling the snow off of their buildings there or hauling it away after they shoveled it off—is it not practicable to keep that north and south alley in condition for foot travel during the winter?

A. I wouldn't say it is practicable; no.

Q. Why not?

(Testimony of A. E. Lathrop.)

A. It is simply absurd to attempt to keep the alley open for foot travel. [276—236]

Q. Why is it absurd?

A. Why, it is a great expense—

Q. You mean it is absurd because you don't think there will ever be any sufficient travel to justify it or any occasion to use it that would justify it?

A. There is no travel in that alley.

Q. Do you think there would be no travel in the alley if this portion of Burkhart Alley was closed that lies across Lots 7 and 8—would that increase the travel in the north and south alley?

A. It would, I imagine; the people would have to get into their buildings some way.

Q. What buildings?

A. On the alley, the cabins; there are two or three cabins along the alley there.

Q. Three or four, that face on the alley?

A. There may be three or four.

Q. Those people have always gotten in and out ever since their buildings have been there, through this same alley?

A. Through the Burkhart Alley.

Q. And along the north and south alley to the Burkhart Alley?

A. They don't travel that way at all—they travel through the Burkhart Alley.

Q. How do they get to the cabins?

A. Through the Burkhart Alley—they shovel a

(Testimony of A. E. Lathrop.)

path across to their cabins; their cabins are not all on the alley.

Q. They find a way of getting through?

A. Sure. [277—237]

(By Mr. MEDLEY.)

Q. Captain, the first 50 feet of the public alley next to C Street is occupied by the Adams Building on the one side and the Ostrander Building on the other?

A. Yes, the Ostrander Building is 60 feet wide instead of 50.

Q. The Ostrander Building is where the post-office used to be? A. Yes.

Q. Mail from the boats and trains was delivered to the postoffice through the alley, was it not?

A. To that point; yes.

Q. That part of the alley had to be kept continually open for travel?

A. That part of the alley was used exclusively by me and was shoveled out and kept open by me.

Q. It was kept open for travel? A. Yes, sir.

Q. The next 50 feet going toward Burkhart Alley is occupied by Clayson's two lots?

A. Yes, sir.

Q. All those buildings do not run back to the alley? A. No.

Q. Snow from his building wouldn't fall on the alley? A. No, sir.

Q. The next fifty feet toward the alley are occupied by Mr. Donohoe's two lots, which you rented? A. Yes, sir.

(Testimony of A. E. Lathrop.)

Q. Acrossed the alley from Mr. Donohoe's lots, the rear portion of the lots facing on Second Street, were not occupied, were they?

A. No, they are not occupied.

Q. And you could throw snow from your building acrossed the alley on to the vacant lots?

[278—238] A. No.

Q. Why? A. It is too long a throw.

Q. How high was the building?

A. Two stories.

Q. How high in feet?

A. Twenty-four feet, I think.

Q. You contend that a man with a shovel on top of that building couldn't throw acrossed a 14-foot alley from a 24-foot height?

A. I have hired men to shovel snow and if I could get that snow over the alley, I would certainly do it. You can't shovel that heavy snow off the building, acrossed the alley.

Q. How wide are the sidewalks in the town of Cordova?

A. On First Avenue they are ten feet, I believe.

Q. Is it possible to throw the snow off of the roofs of the buildings, acrossed the sidewalks on to the street?

A. Yes, the roofs of the buildings are very much higher on the front.

Q. Suppose they were the same height?

A. Is it possible?

Q. Yes.

Q. Yes. A. Yes, you can throw ten feet.

(Testimony of A. E. Lathrop.)

Q. But you can't throw 14?

A. No, you can't do it.

Q. You mean to tell the Court that you did not instruct the men shoveling the roof of your building to throw this snow over on to the vacant lot?

A. I mean we did not try to get it over there.

Q. And some of the snow did go over?

A. I suppose some would slide off. [279—239]

Q. The greater portion?

A. No, the greater portion would remain in the alley.

Q. You were familiar with the property known as the Horseshoe Building fronting on First Street and has its rear end on the alley? A. Yes, sir.

Q. A good portion of the time that building extended back 100 feet to the alley? A. No.

Q. Snow shoveled off of that building wouldn't fall on the alley? A. No, sir.

Q. How far back did that building extend?

A. I think 60 feet.

Q. They would have to throw the snow 40 feet then before it could hit the alley? A. Yes, sir.

Q. The same thing was true of the next building?

A. The next building don't reach the alley—it is in a gully and they have a big hole for the snow.

Q. The Horseshoe Building was a 60 foot building? A. Yes, sir.

Q. How about the next building occupied by Finklestein?

A. That is not a full length building and has a big ravine under it for snow.

(Testimony of A. E. Lathrop.)

Q. How wide is it?

A. The Finklestein Building is 50 feet.

Q. And snow from that building wouldn't land in the alley? A. No, it couldn't land in the alley.

Witness excused.

EVIDENCE CLOSED. [280—240]

Plaintiffs' Exhibit "B."

LAND CONTRACT.

No. —

THIS AGREEMENT, made in duplicate this 8th day of July, A. D. 1918, between Maud Ashland, party of the first part, of Seattle, Washington, and Alice Johnson of Cordova, Alaska, party of the second part, WITNESSETH:

The party of the first part, in consideration of the sum of Five Thousand Dollars, to be paid as hereinafter agreed, and of the faithful performance of the covenants, agreements and conditions hereinafter expressed on the part of the party of the second part, agrees to sell to the party of the second part the parcel of land situate and being in the town of Cordova, District of Alaska, according to plat recorded in Cordova Recording District, being a portion of United States official survey No. 449, described as follows, to wit: Being Lot No. 25 in Block No. 7 according to map and plat thereof recorded in the office of the recorder of Cordova Recording District of Alaska, in Book — of Deeds, page —.

The party of the second part covenants and agrees

to purchase of the party of the first part the above described lands and to pay therefor the sum of Five Thousand Dollars, as follows: \$1,000 at or before the execution of this contract, the receipt of which is hereby acknowledged; the sum of \$100 with interest from date at 12 per cent per annum on the 6th day of each and every month thereafter until paid in full at Bank of Alaska, Cordova, Alaska.

In case the party of the second part shall fail to pay when due any installment of principal or interest specified above, or to pay any taxes or assessments before the date when the same shall become delinquent, or shall fail to keep said premises, at all times during the life of this agreement, free from mechanics, laborers or other liens or shall be in default in respect to any other condition of [281—241] this agreement, then the whole of the principal and interest unpaid shall, at the option of the party of the first part, become due and payable, forthwith without notice.

The party of the second part covenants and agrees that so long as this contract remains in force he will, before the same becomes delinquent according to law, pay all taxes and assessments, ordinary and extraordinary, that may be levied or assessed, or that may become chargeable on said premises, and during all of said time he will keep said premises and the buildings and structures thereon free from all mechanics, laborers or other liens, and that the buildings or improvements now on said lands, or that shall hereafter be placed thereon, shall not be

removed therefrom, but they shall be and remain the property of the party of the first part until this contract shall be fully performed by the party of the second part. Should default be made in the payment of the principal or interest aforesaid, or in the payment of the taxes or assessments upon said land, or in the performance of any other covenant herein contained, then, and in that case, this agreement, at the option of the party of the first part shall be null and void, and all payments that shall have been made, and all buildings and improvements on said land, shall be and forever remain the absolute property of the party of the first part, it being expressly understood and agreed that time is the essence of this contract.

The party of the first part hereby reserves the right, at any time during the life of this agreement, to post the notice required by section 265 of the Civil Code of Alaska relating to liens, upon said premises or buildings being constructed thereon.

Upon a full and prompt performance by the party of the second part of each and every of the said covenants and agreements by him to be performed, including the payments at the times above set forth, the party of the first part will execute and deliver to the party of [282—242] the second part, a deed of conveyance of the said land upon the surrender and delivery to the party of the first part of this agreement.

Notice of the cancellation of this contract for any breach thereof or notice of the exercise of any other right reserved to the first party herein where this

contract requires notice, shall be addressed to the party of the second part, directed to the postoffice named below, postage prepaid and deposited in the United States postoffice which shall constitute a good and sufficient notice and service thereof.

No assignment or transfer of any interest in this agreement or said premises, less than the whole, will be recognized by the said party of the first part under any circumstances and no assignment shall be binding upon the party of the first part unless in writing endorsed thereon, and approved in writing indorsed thereon by the party of the first part.

Except as herein otherwise provided, this contract shall bind and inure to the benefit of the respective heirs, representatives, successors and assigns of both parties, but no waiver of any of the provisions hereof or any right hereunder shall be valid unless in writing indorsed thereon.

IN WITNESS WHEREOF, the party of the first part and the party of the second part have hereunto subscribed their names and affixed their seals the day and year first above written.

MAUD ASHLAND,

Party of the First Part,

By ROBERT ASHLAND,

Her Attorney in Fact.

ALICE JOHNSON,

Party of the Second Part,

P. O. Address, Cordova, Alaska.

Witnesses to signature of first party:

E. L. HARWOOD.

A. J. ADAMS.

Witnesses to signature of second party:

A. J. ADAMS. [283—243]

United States of America,
District of Alaska,—ss.

This is to certify that before me, A. J. Adams, duly commissioned and qualified, personally appeared Maud Ashland by Robert Ashland, her attorney in fact hereunto duly authorized, to me personally known to be the individual described in and who executed the foregoing agreement and acknowledged to me that they signed the same as their voluntary deed for the uses and purposes therein mentioned.

Given under my hand and seal this the 8th day of July, A. D. 1918.

[Notarial Seal]

A. J. ADAMS,

Notary Public for Alaska.

My Commission expires Feby. 2, 1921.

N. B.—This contract cannot be executed by another for the party of the second part excepting under a properly executed power of attorney, which must be filed with the party of the first part. [284—244]

Certificate of Official Court Stenographer.

I do hereby certify that I am the Official Court Stenographer for the Third Judicial Division of the Territory of Alaska; that as such I reported the proceedings had at the trial of the above-entitled cause, to wit, A. E. Lathrop and Alice Johnson vs. H. A. Slater and Bank of Alaska, a Corporation, being cause No. C/173 of the records of this court;

that the foregoing transcript is a full, true and correct transcript of the evidence introduced and proceedings had at said trial.

I. HAMBERGER.

Dated at Valdez, Alaska, May 15, 1920. [285—245]

Filed in the District Court, Territory of Alaska, Third Division. Mar. 18, 1920. Arthur Lang, Clerk. By C. H. Wilcox, Deputy.

In the District Court for the Territory of Alaska,
Third Division.

No. C—173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Corporation,

Defendants.

Decision.

All the parties to this action are owners of town lots in the incorporated town of Cordova, Third Judicial Division, Territory of Alaska. The plaintiffs seek to enjoin the defendants from closing a certain alley in the town of Cordova which will hereafter be referred to as "Burkhart Alley." Plaintiffs plead a special and different damage from that sustained by the general public and bring action to protect their own rights and for and on behalf of the general public of the town of Cordova. The foregoing brief statement discloses the nature of the action. Issues

having been joined the case was tried to the Court without a jury.

The townsite of Cordova is located for the most part upon a very rough and uneven hillside. First Street, the principal business street of the town, runs north and south. East of First Street and parallel with it is Second Street. The distance between the two streets is 214 feet. Block Seven lies between the two streets. [286] It is subdivided into 32 lots, each 25 feet in width and 100 feet in depth. It is bounded on the north by C Street and on the South by B Street. An alley 14 feet in width, parallel with First Street and Second Street, runs through the entire block.

First Street slopes to the South; Second Street slopes to the north; C Street slopes to the west, intersecting with First Street at an elevation of about 8 feet lower than its intersection with Second Street. The result is that B Street is very steep, its intersection with Second Street being at an elevation of about 26 feet higher than its intersection with First Street. Lots 7 and 8 front on First Street and directly back of them are lots 26 and 25, respectively, fronting on Second Street. On First Street and across the street from lots 7 and 8 is located the "Lathrop Building," the property of A. E. Lathrop, one of the plaintiffs. The plaintiff Alice Johnson is the owner of Lot 25 upon which is located a building known as the "Burkhart Apartments." The defendant H. A. Slater is the owner of lot 7 upon which is located the "Slater Building." The Bank of Alaska, a corporation, is the owner of lot 8, upon

which is erected a substantial business building. It will thus be seen that lots 7, 8, 26 and 25 are approximately in the middle of the block. Block 7, and particularly that portion of it fronting on First Street is in the main business portion of the town.

“Burkhart Alley” begins on First Street and extends through Block 7 to Second Street. It is 8 feet in width. This 8 feet is made up from the south 4 feet of [287] Lots 7 and 26 and the north 4 feet of Lots 8 and 25. It intersects at right angles the alley heretofore described as being 14 feet wide in the middle of the block and parallel with First and Second Streets. As shown by Defendants’ Exhibits 1 and 2, “Burkhart Alley” for the first 100 feet running back to Second Street is entirely covered over by the “Slater Building” and the building of the Bank of Alaska. The walls of these buildings meet at the height of 12 feet from the sidewalk on a line directly above the boundary line of lots 7 and 8. The first 100 feet of “Burkhart Alley” is level and covered with a board walk. At the point of intersection with the alley running north and south through the block “Burkhart Alley” continues up a sharp incline to Second Street. The “Burkhart Apartments” and the buildings across from it on “Burkhart Alley” are both built 4 feet back from the boundary line between lots 26 and 25, but, as is shown on Plaintiffs’ Exhibit “A” and Defendants’ Exhibit No. 2, a walk twenty inches wide, constructed on a line between the basement and the first store of the “Burkhart Apartments,” extends into the “Alley” the distance of its width along the “Apart-

ments.” This walk is necessary to enable occupants to have a side entrance from the “Alley” to rooms in the “Apartments” on the first floor. The “Alley” is planked from Second Street to the rear of the “Slater Building” and the guilding of the Bank of Alaska. As shown by Defendants’ Exhibit No. 3, there are two entrances to the “Slater Building” from “Burkhart Alley,” also two entrances to the building of the Bank of Alaska. At the entrance to “Burkhart Alley” from Second Street the [288] town maintains a street light, and directly across Second Street from the light the town maintains a fire hydrant. It also maintains a light in “Burkhart Alley” very near the rear of the “Slater Building” and the building of the Bank of Alaska. The town maintains a cross-walk across First Street to the sidewalk in front of the “Lathrop Building.” This cross-walk is 6 feet wide and its center line appears to be a projection of the center line of “Burkhart Alley.” The foregoing description of the present physical condition of the premises is in accordance with the evidence all of which is verified by a personal viewing of the premises.

A stipulation entered into by the attorneys of the parties hereto and filed as Defendants’ Exhibit No. 6 traces Slater’s title to lot 7 back to a land contract dated June 12, 1908, entered into between George C. Hazelet, Trustee, and Robert Ashland, followed by a warranty deed dated June 16, 1909, from the said Hazelet to the said Ashland; the title of the Bank of Alaska to lot 8 to a land contract dated June 4, 1908, entered into between George C. Haze-

let, Trustee, and A. E. Burkhart, followed by a warranty deed dated July 12, 1909, from said Hazelet to said Burkhart; the title of Alice Johnson to lot 25 to a warranty deed dated October 1, 1908, from the Copper River Railway Co. to H. B. Burkhart; and the title to lot 26, now being in the Carstens Packing Company, to a land contract dated June 9, 1908, entered into between Geo. C. Hazelet, M. Finkelstein and J. Sapiro, running from the said Hazelet to the said Finkelstein and Sapiro.

The witnesses Robert Ashland, Dave McDonald and [289] M. Finkelstein testify that the owners of lots 7, 8, 26 and 25, at the time buildings were constructed thereon, created "Burkhart Alley" under a belief that it could be closed by them whenever they saw fit so to do. It is testified that the passageway was for the convenience of the owners in conducting their respective lines of business, but the silent witnesses, the buildings themselves, together with all the other testimony in the case, show that this passageway was for the purpose of affording the public easy access to the respective places of business conducted on these lots rather than for the convenience of the property owners. To fully understand the advantage "Burkhart Alley" was to the business interests being conducted on these lots one must bear in mind that Block 7 is 400 feet long by 214 feet in width and that "Burkhart Alley" cuts it in two at about its center, thus making each of lots 7, 8, 26 and 25 an alley corner. B Street is very steep and it naturally follows that the average pedestrian, especially in inclement weather, in

going from First Street to Second Street, travels through "Burkhart Alley" with its passageway covered for nearly half of its entire length. The owners of these properties made the strongest kind of a bid for business by creating "Burkhart Alley" and the testimony shows that the foot travel through this "Alley" has for years exceeded the entire foot travel on both B and C Streets. The owners of these properties are to be commended for their business acumen in thus bringing the public to their very doors.

The evidence further discloses that the Town authorities were not unmindful of the importance of "Burkhart Alley" as a thoroughfare. It was neither an arcade [290] nor was it a cul-de-sac, and I am unable to agree with the contention of counsel that the board walk, 8 feet wide and 100 feet long constructed over portions of lots 7 and 8, was in the nature of a "platform." From "Burkhart Alley" the town maintained a cross-walk across First Street, put in hydrants in a position commanding the "Alley," maintained a street light at the Second Street entrance and since 1915 lighted the "Alley" at the rear of the buildings on lots 7 and 8. The town exercised dominion over the "Alley" through its police department, requiring the owners of lots 7 and 8, 26 and 25 to keep the walk in repair, remove the obstructions placed therein by the owners and their tenants, and to remove accumulations of snow. The course of conduct by the police with reference to the user of the "Alley," the conduct of the owners in granting, in

fact, inviting such use, and the action of the town in exercising dominion over it, have been continuous for a period of more than ten years. It is argued by counsel for the defendants that neither the present owners nor their predecessors in interest ever intended to grant an easement to the public to use "Burkhart Alley"; that the paying of taxes on the lots, keeping the "Alley" in repair, maintaining an awning over on First Street entrance, paying for a light in about the center of the covered portion, making use of it in various ways incident to a use of the buildings abutting thereon for business purposes, negatives any dedication on the part of the owners, and that the joining of the buildings on lots 7 and 8 at the second story for the entire depth of these [291] lots is conclusive proof that there was no right acquired by the public or anyone else either by prescription or by implied dedication.

The distinguishing feature of this case as compared with any cited counsel or any I have been able to find is the joining of the buildings on lots 7 and 8 at the second story. Ordinarily we think of a street or an alley as having unlimited overhead room. This, however, is not absolutely necessary. The owners of lots 7 and 8 could dedicate a limited or an unlimited overhead space. They elected to dedicate a space 8 feet wide, 12 feet high, and 100 feet in length. It was a matter entirely within their control. The question is neither how much nor how little they dedicated. The public accepted the limited space dedicated from lots 7 and 8, the space dedicated from lots 26 and 25 limited

as to width, unlimited as to height. I am convinced that the plaintiff Lathrop has shown a damage special and different from that sustained by the general public though it is not so clear and persuasive as that shown to be sustained by the plaintiff Johnson. If "Burkhart Alley" is closed she sustains a very serious damage as shown by all the evidence. Access to her property through the alley running through the block from B Street to C Street would be of little service even if it were kept in good condition. The evidence shows that its greatest service to the public is as a measure of fire protection and storage-room in the winter for snow from the roofs of the abutting buildings.

In the consideration of this case the Court has been greatly assisted by exhaustive briefs filed by counsel. In my opinion the facts in this case show by a fair preponderance [292] of the evidence that from the time the owners of lots 7, 8, 26 and 25 in Block 7 first constructed buildings thereon, until the defendants in 1919 undertook to close "Burkhart Alley," the said owners and their successors in interest impliedly dedicated "Burkhart Alley" as herein described to the use of the general public.

In 18 C. J., page 53, it is stated:

"2. Intent manifested by acts decisive.

The intention to dedicate to which courts give heed is not an intention hidden in the mind of the landowner, but an intention manifested by his acts. It is not always necessary that an actual intention should exist in the mind of

the owner at the time of the alleged dedication. If the intention is clearly expressed by his open acts and visible conduct, the public and individual citizens may act upon it; and the fact that the owner may have entertained a different intention from that manifested by his acts or declarations, or that in making the dedication he may have acted under a mistake of fact, is of no consequence; and if the owner showed an intent he cannot defeat the effect of his acts by subsequently stating that he did not intend to make a dedication."

Continuing on page 57, the author says:

"Implied dedication—a. In General. One of the methods of acquiring the right to the use of land for the public is that of the implied dedication of the same by the owner of the fee. A dedication is implied when the acts and conduct of the owner manifest an intention to devote the property to public use, and are inconsistent with any other theory than that he intended a dedication. It arises by operation of law, and according to many decisions, is founded upon the doctrine of estoppel in pais, and not upon grant. Under some circumstances a dedication will be implied even against the express declarations of the owner of the land. Whether a dedication has been made is essentially a question of fact, and a fact which may be established by indirect evidence, as no formalities in making a dedication are essential."

Cincinnati vs. White, 31 U. S. 289.

Riley v. Buchanan, 76 S. W. 527.

Kennedy et al. vs. City of Portland, 179 Pac. 667.

In re Roosevelt Ave. in City of New York, 174 N. Y. S. 600.

Evans vs. City of Brookings, 170 N. W. 133.

Wensel vs. Chicago M. & St. P. Ry. Co., 170 N. W. 409, 8 R. C. L., sec. 25, page 900.

Humphrey et al. vs. Krutz et al., 137 Pac. 806.

Robinson v. Gebauer, 152 N. W. 329.

Pittsburg C. C. & St. L. Ry. Co. vs. Ervington, 108 N. E. 133. [293]

The discussion of the law on the subject of dedication in *Keppler vs. City of Richmond*, 98 S. E. 747, is very illuminating. The facts, however, did not permit the Supreme Court to affirm the decision of the Chancery Court. In *re Stees*, 172 N. W. 219, is also of interest in that it shows how the owner of the property for a period of twenty years kept his boundary line marked conspicuously upon the sidewalk. In the case at bar it will be remembered that there was no such distinctive marking nor did the owners of lots 7 and 8 ever put up any sign at either entrance to "Burkhart Alley" or anywhere else therein designating it as a "private way." A keen observer might notice that at a point beginning in the center of the "Alley" at the second story there is a board about six inches in width running to the cornice. The cornice, however, continues along the front of both buildings on

the same line and without a break at the dividing line. The siding, also, is board for board on the same line from the cornice to the beginning of the second story. I do not think the public could reasonably be held to be put upon inquiry as to boundary lines by the style of building. The public was not interested in the second story except in so far as it afforded protection in inclement weather.

There is some evidence showing that the owners of lots 7 and 8 use a portion at least of the space under the sidewalk through the "Alley" and therefore it is contended by the defendants that the easement, if such it is, amounts to nothing more than an easement of a "hole in the air." In answer to this it may be said that the public is not concerned with what use is made of the space under the walk. If the defendants choose to term it merely a "hole in the air" such a description will not affect the [294] rights of the plaintiffs or of the general public. In fact, that is exactly what they are now insisting it is and has been and that it be maintained.

See *In re Third Ave.*, 130 N. Y. S. 80-84.

Findings of Fact and Conclusions of Law in accordance with the views herein expressed may be prepared and submitted.

Dated March 1, 1920.

CHARLES E. BUNNELL,
District Judge.

Entered Court Journal No. 12, page No. 622.
[295]

Filed in the District Court, Territory of Alaska,
Third Division. May 26, 1920. Arthur Lang,
Clerk. By C. F. Wilcox, Deputy.

In the District Court for the Territory of Alaska,
Third Division.

No. C-173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,

Defendants.

Findings of Fact and Conclusions of Law.

This cause came on regularly for trial at Cordova, Alaska, on the 11th day of December, 1919, and was tried by the Court without a jury. Each of the plaintiffs being present in person and represented by their attorneys, Donohoe & Dimond and the defendant H. A. Slater being present in person and represented by his attorney, Edward F. Medley, Esq., and the defendant Bank of Alaska, a corporation, being represented by its attorney, B. O. Graham, Esq., and the Court having heard all the testimony and the argument of counsel, took the matter under advisement and granted the attorneys of the respective parties the right to file their briefs and thereafter briefs were duly filed and given due consideration by the Court, and the Court after duly considering all the evidence introduced and being fully advised in the premises did on the 1st day of

March, 1920, render its written opinion in favor of the plaintiffs and against the defendants and in accordance with said written opinion now makes and enters its written findings of fact and conclusions of law. [296]

FINDINGS OF FACT.

I.

The Court finds that each of said plaintiffs are citizens of the United States, residents and inhabitants of the town of Cordova, Territory of Alaska; that each of said plaintiffs are particularly damaged in a manner special and different from the damage to the general public of the town of Cordova, by the acts committed by the above-named defendants and in the acts threatened to be committed by the above-named defendants as hereinafter set forth. That plaintiffs bring this action to protect their own private rights and for and on behalf of the general public of the said town of Cordova.

II.

That the defendant Bank of Alaska is a corporation organized and existing under and by virtue of the laws of the territory of Alaska; that each of said defendants have duly and regularly entered a general appearance in this action and this Court has jurisdiction of the person of all the parties to this action and of the subject matter of this action.

III.

That the plaintiff A. E. Lathrop is the owner of Lots Nos. 23, 24 and 25 in Block No. 2, of the town of Cordova, which property abuts on the westerly side line of First Street of said town of Cordova;

that said plaintiff has erected on said property within the past year a large building at a cost of upwards of One Hundred Thousand (\$100,000.00) Dollars, that in said building said plaintiff operates a motion picture theater and rents a number of stores for the conduct of mercantile businesses and also rents a number of living apartments and offices. [297] That the town of Cordova maintains a cross-walk across First Street from the westerly terminus of Burkhart Alley, hereinafter described, to the main entrance of this plaintiff's said building; that a large number of the patrons of this plaintiff's theater and customers of his tenants and a large number of his tenants occupying his apartments and offices reach said building by way of and through Burkhart Alley and over said cross-walk. That if said defendants are permitted to obstruct said Burkhart Alley and close the same to the travel of the general public and to this plaintiff, this plaintiff will be specially damaged thereby, by causing a reduction in the rental values of said building and this plaintiff's income therefrom and will greatly depreciate the value of this plaintiff's said building and he will thereby suffer irrevocable injury and loss.

IV.

That plaintiff Alice Johnson is the owner of Lot No. 25, in Block No. 7, of the town of Cordova; that said lot lies along the southerly side of Burkhart Alley hereinafter described; that the easterly end of said lot, abuts on the westerly side line of Second Street and extends from Second Street in

a westerly direction a distance of one hundred (100) feet to the fourteen (14) foot alley running north and south through block No. 7, of said town of Cordova; that this plaintiff has upon said lot a three (3) story building used by her as an apartment house; that the only entrance to her said apartments on the basement story is off Burkhart Alley and on the second story by a walk from Second Street along said building projecting into Burkhart Alley 20' wide to entrances facing on Burkhart Alley; that this plaintiff purchased [298] said lot on the 8th day of July, 1918, at which time and for a great many years prior thereto, Burkhart Alley was and had been an open public way and was and had been continually used by the public as such. That if the said defendants are permitted to obstruct the said Burkhart Alley and close the same to travel by the general public and to the use of this plaintiff, this plaintiff will suffer irreparable injury and loss in her property rights in said lots and building thereon and the rental value of her apartments will be greatly depreciated and the value of her said lot and building will be greatly depreciated.

V.

That on or about the month of May, 1908, the tract of land now covered by the town of Cordova was surveyed, platted and laid off in lots and blocks, streets and alleys; that Block No. 7, in said town, contains Lots Nos. from 1 to 16, inclusive, abutting on the easterly side of First Street and Lots Nos. from 17 to 32, inclusive, abutting on the westerly

side of Second Street; that said block is 400 feet long by 214 feet wide. That there is an alleyway 14 feet wide and extending northerly and southerly through the center of said block from "C" Street on the north to "B" Street on the south; that during the years 1908 and 1909, the original owners of the townsite of Cordova sold to the general public practically all the lots in said townsite of Cordova and a great number of buildings have been erected on said lots; that First Street is the principal business street in said town; that at the time of this trial, the population of said town of Cordova was between 2,000 and 3,000 people.

VI.

That in the summer of the year 1908, Lot No. 7, [299] in Block No. 7, of said town was owned by Robert Ashland; Lot No. 8 in Block No. 7 was owned by A. E. Burkhart; Lot No. 25 in Block No. 7 was owned by A. E. Burkhart; Lot No. 26 in Block 7 was owned by M. Finkelstein and J. Sapiro; that at said time the owners of said lots were about to erect buildings upon their respective lots and they agreed among themselves to open an alley 8 feet wide from First Street to Second Street in said town; the center line of said alley running along the dividing line between lots Nos. 7 and 8 and Lots Nos. 25 and 26 in said Block No. 7, in said town; that the owners of Lot No. 7 and Lot No. 26 in Block No. 7, gave 4 feet off the southerly side of their said lots for said alley and the owners of Lots Nos. 8 and 25, in Block No. 7 gave 4 feet off the northerly side of their said lots for said alley; that

said alley thereupon became known and ever since has been and now is known as and called Burkhart Alley; that shortly thereafter the owners of the four lots herein described erected buildings on each of their said lots, the side walls of said buildings being four feet from the side line of said lots, thus leaving an alley eight feet wide from First Street to Second Street; that the owners of said lots made many entrances into their said buildings from Burkhart Alley; that at the time said alley was opened as hereinbefore described, the owner of Lot No. 25 erected two high walks 20 inches wide which did not follow the grade of the alley but were on a level of the first and second floor of the building erected on said Lot No. 25, so that the occupants of the apartments in said building might conveniently reach the same in said alley; that when the buildings were erected on Lots Nos. 7 and 8, the side walls of each of said buildings [300] for the first story were set back four feet from the side line of the respective lots, but at a height of 12 feet the floor of the second story of each of said buildings was extended out to the dividing line between said lots, thus leaving a covered passageway or alley 8 feet wide by 12 feet high and 100 feet long; that Burkhart Alley as herein described was originally opened up and ever since has been used and maintained.

VII.

That said Burkhart Alley was first opened to public travel about the month of October, 1908, and it ever since has been used by the general public

as a public highway and ever since has continuously and without interruption, hindrance or permission of anyone been used as a public street, alley or highway by the general public and by these plaintiffs.

VIII.

That on the 14th day of July, 1909, the municipality of the town of Cordova was duly incorporated and organized; that from that day until the trial of this action the common council of the town of Cordova has exercised rights of ownership, authority and control over Burkhart Alley without hindrance, objection or permission from anyone whomsoever; that the said common council has provided for the lighting of said Burkhart Alley a good portion of said time and has supervised and required the sidewalk in said alley to be kept in good repair and has caused fire hydrants to be placed opposite the intersection of said [301] Burkhart Alley with First Street and Second Street; had erected and maintained a good substantial cross-walk six feet wide from the westerly terminus of Burkhart Alley across First Street; that the center line of said cross-walk is a continuation of the center line of said Burkhart Alley and by numerous and other acts has exercised dominion and control over said Burkhart Alley from the time of the organization of said municipality until the present time.

IX.

That at no time since Burkhart Alley was opened to the public use as hereinbefore described have the

owners of any of the four lots abutting on said alley claimed or contended to the public that said alley was not a public highway until defendant Slater herein on the 8th day of August, 1919, and the defendant Bank of Alaska, on the 10th day of September, 1919, attempted to obstruct and close said Burkhart Alley and prevent the public and these plaintiffs from the free use and enjoyment thereof.

XI.

That defendant H. A. Slater became the owner of Lot No. 7 in Block No. 7, in the said town in the year 1917; that defendant Bank of Alaska became the owner of Lot No. 8 in Block No. 7 in said town in the year 1918; that at the time each of said defendants purchased their respective lots, said Burkhart Alley was a public highway and had been continuously used by the general public since the year 1908 as a public highway and each of said defendants had full knowledge of said fact. [302]

XI.

That on the 8th day of August, 1919, defendant H. A. Slater unlawfully and without right or authority obstructed the free use and enjoyment of Burkhart Alley as a public thoroughfare and prevented these plaintiffs and the general traveling public from the free use and enjoyment of said Burkhart Alley as a public highway by fencing off and enclosing four feet of the northerly side of Burkhart Alley extending along the entire length of Lot No. 7 in Block No. 7; that on the 10th day of September, 1919, the defendant Bank of Alaska, ob-

structed and prevented the free use and enjoyment of said Burkhart Alley as a public thoroughfare by erecting a fence enclosing the southerly four feet of said Burkhart Alley commencing at First Street and extending a distance of 100 feet to the rear of Lot No. 8 in Block No. 7 of said town of Cordova; that each of said defendants unlawfully claimed the right to close and obstruct Burkhart Alley as the same passes over and upon Lots Nos. 7 and 8 in said Block No. 7 and each of said defendants threaten to and intend to permanently obstruct and close said Burkhart Alley from First Street to the rear of Lots Nos. 7 and 8, a distance of 100 feet, and threaten to and intend to prevent these plaintiffs and the general public of the town of Cordova from occupying, using and enjoying said Burkhart Alley as a public thoroughfare, and unless each of said defendants are enjoined by this Court, they and each of them will obstruct and close said Burkhart Alley as above set forth and will prevent these plaintiffs and the general public of said town of Cordova from the free use and enjoyment of said Burkhart Alley. [303]

XII.

That if said defendants or either of them is permitted to obstruct and close said Burkhart Alley and prevent these plaintiffs and the general public from the free use and enjoyment of said Burkhart Alley, these plaintiffs will suffer great and irreparable injury and loss in their property rights and the traveling public of the town of Cordova will suffer great inconvenience, loss and damage.

XIII.

That more than ten (10) years have elapsed since said Buhkhart Alley was first used as a public street, prior to the time either of these defendants first asserted or claimed the right to close said alley or any portion thereof; and during all of said time, said Burkhart Alley was continuously and without interruption used by and in the exclusive possession of the inhabitants, residents and general public of the said town of Cordova, as a public street or alley, with the knowledge and acquiescence at all times of the owners of all of said lots crossed by said alley and without license, or permission of, or hindrance or objection from, any person or persons whomsoever; and that such use and possession by the public of said alley as a public alley was during all of said time adverse, hostile, continuous, exclusive and under color and claim of right; that the common council of the town of Cordova, shortly after said Burkhart Alley was first opened to public travel and use as hereinbefore stated, accepted said alley as a public thoroughfare by lighting the same, keeping the same clear from all obstructions, requiring the sidewalk in said alley [304] to be kept in good repair and generally exercised supervision, control and ownership over said alley and continued to do so up to the present time; that the travel and use of said alley by the general public passing through said alley and over and upon the same, far exceeded the travel on either "B" or "C" Street

between First and Second Street during all the time hereinbefore mentioned.

XIV.

That plaintiffs have no plain, speedy or adequate remedy at law.

Dated this 26th day of May, 1920.

CHARLES E. BUNNELL,
Judge.

CONCLUSIONS OF LAW.

From the foregoing findings of fact, the Court makes and enters its conclusions of law as follows:

I.

That said Burkhart Alley in the month of October, 1908, became and ever since has been and now is a public thoroughfare or alley by reason of an implied dedication arising from the acts of the owners of Lots Nos. 7 and 8 and Lots Nos. 25 and 26, in Block No. 7, in the town of Cordova.

II.

That said Burkhart Alley as described in the foregoing findings of fact, at the time when said defendants attempted to obstruct a portion of said alley, to wit, on the 8th day of August, 1919, and on the 10th [305] day of September, 1919, was, and even since has been, and now is, a public thoroughfare and alley by prescription, the same having been used exclusively and continuously by the general public of the town of Cordova for a period of more than ten years prior to the said 8th day of August, 1919, under color of title and claim of right, and adverse and hostile to the owners of the respective lots over which said alley

passes and with the knowledge and acquiescence of said owners, but without their license or permission, and without any objections from them or any of them.

III.

That plaintiffs are entitled to have said Burkhart Alley, as described in the foregoing findings of fact, maintained and kept free from obstructions and continuously open for the free and uninterrupted travel and use by these plaintiffs and the general public of the town of Cordova, as a public thoroughfare or alley.

IV.

That these plaintiffs are entitled to have said defendants and each of them enjoined from in any manner obstructing or closing said Burkhart Alley as described in the foregoing findings of fact where the same passes upon and over Lots Nos. 7 and 8, in Block No. 7, in said town of Cordova, to wit: An alley eight (8) feet wide, the center of which is the dividing line between Lots Nos. 7 and 8, in Block No. 7, and twelve (12) feet high for the entire length of Lots Nos. 7 and 8, and from in any manner whatever obstructing or closing said alley or any part or portion thereof or in any manner interfering with the free use and enjoyment thereof as a public highway as the same was then [306] first laid out and opened to public use and travel and ever since has been used and traveled by the public.

V.

That plaintiffs have decree against defendants

and each of them in accordance with their prayer of their amended complaint and in accordance with the foregoing conclusions of law, and have judgment against said defendants and each of them for the costs and disbursements incurred in this action by plaintiffs.

Dated this 26th day of May, 1920, and done and signed in open court.

By the Court:

CHARLES E. BUNNELL,
District Judge.

Entered Court Journal No. 12, page No. 807.
[307]

Filed in the District Court, Territory of Alaska,
Third Division. May 26, 1920. Arthur Lang,
Clerk. By C. H. Wilcox, Deputy.

In the District Court for the Territory of Alaska,
Third Division.

No. C—173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,
Defendants.

Defendants' Exceptions to Findings of Fact and Conclusions of Law.

1. The defendants except to that part of Finding No. 1 which reads as follows:

“that each of said plaintiffs are particularly damaged in a manner special and different from the damage to the general public of the town of Cordova, by the acts committed by the above-named defendants and in the acts threatened to be committed by the above-named defendants as hereinafter set forth.”

upon the ground that said finding in so far as it relates to the plaintiff Lathrop is not supported by the evidence. Defendants also except to that part of Finding No. 1, quoted above, upon the ground that it is not supported by the evidence in so far as it relates to the plaintiff Johnson.

2. The defendants except to that portion of Finding No. 1 which reads as follows:

“That plaintiffs bring this action for and on behalf of the general public of the said town of Cordova,”

for the reason that said proposition is not supported by the evidence. [308]

3. The defendants except to that portion of Finding No. 3 which reads as follows:

“That if said defendants are permitted to obstruct said Burkhart Alley and to close the same to the travel of the general public and to this plaintiff, this plaintiff will be specially

damaged thereby, by causing a reduction in the rental values of said buildings and this plaintiff's income therefrom and will greatly depreciate the value of this plaintiff's said building and he will suffer irrevocable injury and loss,"

upon the ground that said proposition, in so far as it relates to the plaintiff Lathrop, is not supported by the evidence.

Defendants also except to the above-quoted part of the said Finding No. 3 upon the ground that, in so far as it relates to the plaintiff Johnson, it is not supported by the evidence.

4. Defendants except to that portion of Finding No. 4, which reads as follows:

"that the only entrance to her said apartments is off Burkhart Alley,"

upon the ground that said proposition is not supported by the evidence. This finding modified by the Court and defendants excepted to the same, as modified, upon the same ground.

5. Defendants except to that portion of Finding No. 4 which reads as follows: [309]

"at which time and for a great many years prior thereto, Burkhart Alley was and had been an open public way,"

upon the ground that said proposition is not supported by the evidence.

6. Defendants except to that part of Finding No. 4 which reads as follows:

"and was and had been continually used by the public as such,"

upon the ground that said proposition is not supported by the evidence.

7. Defendants except to that part of Finding No. 4 which reads as follows:

“That if the said defendants are permitted to obstruct the said Burkhart Alley and to close the same to travel by the general public and to the use of this plaintiff, this plaintiff will suffer irreparable injury and loss in her property rights in said lot and building,”

upon the ground that said proposition is not supported by the evidence.

8. Defendants except to that part of Finding No. 4 which reads as follows:

“and the rental value of her apartments will be greatly depreciated and the value of her said lot and building will be greatly depreciated,”

upon the ground that said proposition is not supported by the evidence.

9. Defendants except to that part of Finding No. 6 which reads as follows:

“and they agreed among themselves to open an alley 8 feet wide from First Street to Second Street in said town,”

upon the ground that said proposition is not supported by the evidence. [310]

10. Defendants except to that part of Finding No. 6 which reads as follows:

“that the owners of Lot No. 7 and Lot No. 26 in Block No. 7, gave 4 feet off the Southerly side of their said lots for said Alley,”

upon the ground that said proposition is not supported by the evidence.

11. Defendants except to that part of Finding No. 6 which reads as follows:

“the owners of Lots Nos. 8 and 25, in Block No. 7, gave 4 feet off the Northerly side of their said lots for said alley,”

upon the ground that said proposition is not supported by the evidence.

12. Defendants except to that part of Finding No. 6 which reads as follows:

“that Burkhart Alley as herein described was originally opened up and ever since has been used and maintained,”

upon the ground that said proposition is not supported by the evidence and upon the further ground that said finding is too indefinite and uncertain in that it does not show by whom said so-called alley was maintained.

13. Defendants except to that part of Finding No. 7 which reads as follows:

“That said Burkhart Alley was first opened up to public travel about the month of October, 1908,”

upon the ground that said proposition is not supported by the evidence.

14. Defendants except to that part of Finding No. 7 [311] which reads as follows:

“and it ever since has been used by the general public as a public highway,”

upon the ground that said proposition is not supported by the evidence.

15. Defendants except to that part of Finding No. 7 which reads as follows:

“and even since has continuously and without interruption, hindrance or permission of anyone been used as a public street, alley or highway by the general public and by these plaintiffs,”

upon the ground that said proposition is not supported by the evidence.

16. Defendants except to that part of Finding No. 7 which reads as follows:

“and ever since has . . . without . . . permission of anyone been used as a public street, alley or highway by the general public and by these plaintiffs,”

upon the ground that said proposition is not supported by the evidence.

17. Defendants except to that part of Finding No. 8 which reads as follows:

“the common council of the town of Cordova has exercised rights of ownership, authority and control over Burkhart Alley without hindrance, objection or permission from anyone whomsoever,”

upon the ground that said proposition is not supported by the evidence.

18. Defendants except to that part of Finding No. 8 which reads as follows:

“that the said common council has provided for the lighting of said Burkhart Alley a good portion of said time,” [312]

upon the ground that said proposition is not supported by the evidence.

19. Defendants except to that part of Finding No. 8 which reads as follows:

“and has supervised and required the sidewalk in said alley to be kept in good repair,” upon the ground that said proposition is not supported by the evidence.

20. Defendants except to that part of Finding No. 8 which reads as follows:

“and by numerous and other acts has exercised dominion and control over said Burkhart Alley from the time of the organization of said municipality until the present time,” upon the ground that said proposition is not supported by the evidence, and is indefinite and uncertain.

21. Defendants except to that part of Finding No. 9 which reads as follows:

“That at no time since Burkhart Alley was opened to the public use as hereinbefore described, have the owners of any of the four lots abutting on said alley claimed or contended to the public that said alley was not a public highway until defendant Slater herein on the 8th day of August, 1919, and the defendant Bank of Alaska, on the 10th day of September, 1919, attempted to obstruct and close said Burkhart Alley and prevent the public and these plaintiffs from the free use and enjoyment thereof,”

upon the ground that said proposition is not supported by the evidence.

22. Defendants except to that part of Finding No. 10 which reads as follows:

“that at the time each of said defendants purchased their respective lots, said Burkhart Alley was a public highway,” [313]

upon the ground that said proposition is not supported by the evidence.

23. Defendants except to that part of Finding No. 10 which reads as follows:

“and has been continuously used by the general public since the year 1908, as a public highway,”

upon the ground that said proposition is not supported by the evidence.

24. Defendants except to that part of Finding No. 10 which reads as follows:

“and each of said defendants had full knowledge of said fact,”

upon the ground that said proposition is not supported by the evidence, as to either of said defendants.

25. Defendants except to that part of Finding No. 11 which reads as follows:

“That on the 8th day of August, 1919, defendant H. A. Slater unlawfully and without right or authority obstructed the free use and enjoyment of Burkhart Alley,”

upon the ground that said proposition is not supported by the evidence.

26. Defendants except to that part of Finding No. 11 which reads as follows:

“that each of said defendants unlawfully claimed the right to close and obstruct Burkhart Alley,”

upon the ground that said proposition is not supported by the evidence.

27. Defendants except to that part of Finding No. 12 [314] which reads as follows:

“That if said defendants or either of them is permitted to obstruct and close said Burkhart Alley and prevent these plaintiffs and the general public from the free use and enjoyment of said Burkhart Alley, these plaintiffs will suffer great and irreparable injury and loss in their property rights,”

upon the ground that said proposition is not supported by the evidence.

28. Defendants except to that part of Finding No. 12 which reads as follows:

“and the travelling public of the town of Cordova will suffer great inconvenience, loss and damage,”

upon the ground that said proposition is not supported by the evidence.

29. Defendants except to that part of Finding No. 13 which reads as follows:

“That more than ten (10) years have elapsed since said Burkhart Alley was laid out and first used as a public street, prior to the time either of these defendants first as-

serted or claimed the right to close said alley, or any portion thereof,”

upon the ground that said proposition is not supported by the evidence.

30-a. Defendants except to that part of Finding No. 13 which reads as follows:

“and during all of said time, said Burkhart Alley was continuously and without interruption used by and in the exclusive possession of the inhabitants, residents and general public of the said town of Cordova, as a public street or alley,”

upon the ground that said proposition is not supported by the evidence.

30-b. Defendants except to that part of Finding No. 13 which reads as follows:

“with the knowledge and acquiescence at all times of the owners of all of said lots crossed by said alley and without license or permission of, or hindrance or objection from any person or persons whomsoever,” [315]

upon the ground that said proposition is not supported by the evidence.

30-c. Defendants except to that part of Finding No. 13 which reads as follows:

“and that such use and possession by the public of said alley as a public alley was during all of said time, adverse, hostile, continuous, exclusive and under color and claim of right,”

upon the ground that said proposition is not supported by the evidence.

31. Defendants except to that part of Finding No. 13 which reads as follows:

“that the common council of the town of Cordova, shortly after said Burkhart Alley was first opened to public travel and use as hereinbefore stated, accepted said alley as a public thoroughfare by lighting the same,”

upon the ground that said proposition is not supported by the evidence.

32. Defendants except to that part of Finding No. 13 which reads as follows:

“That the common council of the town of Cordova . . . accepted said alley as a public thoroughfare by . . . keeping the same clear from all obstructions,”

upon the ground that said proposition is not supported by the evidence.

33. Defendants except to that part of Finding No. 13 which reads as follows:

“that the common council of the town of Cordova . . . accepted said alley as a public thoroughfare by . . . requiring the sidewalk in said alley to be kept in good repair,”

[316]

upon the ground that said proposition is not supported by the evidence.

34. Defendants except to that part of Finding No. 13 which reads as follows:

“and generally exercised supervision, control and ownership over said alley and continued to do so up to the present time,”

upon the ground that said proposition is not supported by the evidence and is indefinite and uncertain.

35. Defendants except to that part of Finding No. 13 which reads as follows:

“that the travel and use of said alley by the general public passing through said alley and over and upon the same, far exceeded the travel on either ‘B’ or ‘C’ Street between First and Second Street during all the times hereinbefore mentioned,”

upon the ground that said proposition is not supported by the evidence.

36. Defendants except to Conclusion of Law No. 1, which reads as follows:

“That said Burkhart Alley in the month of October, 1908, became and ever since has been and now is a public thoroughfare or alley by reason of an implied dedication arising from the acts of the owners of Lots Nos. 7 and 8 and Lots Nos. 25 and 26, in Block No. 7 in the Town of Cordova,”

upon the ground that said conclusion of law is not supported by the evidence or findings.

37. Defendants except to Conclusion of Law No. 2 upon the ground that said conclusion of law is not supported by the findings or evidence.

38. Defendants except to that part of Conclusion of Law No. 2, which reads as follows: [317]

“That said Burkhart Alley as described in the foregoing findings of fact, was at the time when said defendants attempted to obstruct and

close a portion of said alley, to wit: On the 8th day of August, 1919, and the 10th day of September, 1919, was, and ever since has been and now is a public thoroughfare and alley by prescription,”

upon the ground that said conclusion of law is not supported by the findings of fact or by the evidence.

39. Defendants except to Conclusion of Law No. 3 upon the ground that same is not supported by the findings of fact, or evidence.

40. Defendants except to that part of Conclusion of Law No. 4, which reads as follows:

“That these plaintiffs are entitled to have said defendants and each of them enjoined from in any manner obstructing or closing said Burkhart Alley as described in the foregoing findings of fact where the same passes upon and over Lots Nos. 7 and 8, in Block No. 7, in said Town of Cordova,”

upon the ground that said proposition is not supported by the findings of fact, or by the evidence.

41. Defendants except to Conclusion of Law No. 4 upon the ground that the proposition of law therein stated is not supported by the findings of fact, or by the evidence.

42. Defendants except to Conclusion of Law No. 5, or the order contained in paragraph No. 5 of said Conclusions of Law, if same is intended as an order, upon the ground that same is not supported by the

findings of fact, conclusions of law or by the evidence.

B. O. GRAHAM,
EDWARD F. MEDLEY,
Attorneys for Defendants. [318]

Order Allowing Exceptions.

On this 26th day of May, 1919, at the time the Findings of Fact and Conclusions of Law in the above-entitled suit were presented to the Court, the defendants duly and regularly objected to the findings and parts of findings specified in the foregoing and attached exceptions, upon the grounds therein respectively assigned, and the Court, after considering such objections, overruled each and every one thereof, to each and every one of which rulings the defendants thereupon excepted; and,

At the same time, the defendants objected to the Conclusions of Law and to the parts of such conclusions specified in the foregoing and attached exceptions, upon the grounds therein respectively assigned, and the Court, after considering such objections, overruled each and every one thereof, to each and every one of which rulings the defendants thereupon excepted.

THEREFORE, IT IS ORDERED, that each and every one of said exceptions to such findings and to the parts thereof so specified and each and every one of said exceptions to such conclusions and to the parts thereof so specified, and that each and every one of said rulings and defendants' said exceptions thereto, be, and the same hereby are al-

lowed and made a part of the record in this cause.

DONE IN OPEN COURT, at Valdez, Alaska,
this 26th day of May, 1919.

CHARLES E. BUNNELL.

District Judge.

Filed in the District Court, Territory of Alaska,
Third Division. May 26, 1920. Arthur Lang,
Clerk. By C. H. Wilcox, Deputy. [319]

Filed in the District Court, Territory of Alaska,
Third Division. May 26, 1920. Arthur Lang,
Clerk. By C. H. Wilcox, Deputy.

In the District Court for the Territory of Alaska,
Third Division.

No. C-173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,

Defendants.

**Order Extending the Time Within Which
Defendants may Prepare, File and Serve Bill
of Exceptions.**

Upon application of the defendants H. A. Slater
and Bank of Alaska, by their attorneys of record
in the above-entitled suit,—

IT IS ORDERED, that the time within which the defendants may prepare, file and serve bill of exceptions in the above-entitled suit, be, and such time hereby is extended to and including the 20th day of August, 1920.

DONE IN OPEN COURT, at Valdez, Alaska, this 26th day of May, 1920.

CHARLES E. BUNNELL,
Judge of the District Court.

Service of the foregoing order by receipt of a true copy thereof is hereby accepted and admitted this 26th day of May, 1920.

DONOHOE & DIMOND,
By ANTHONY J. DIMOND,
Attorneys for Plaintiffs.

Entered Court Journal No. 12, page No. 814.
[320]

In the District Court for the Territory of Alaska,
Third Division.

No. C-173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,
Defendants.

**Order Settling and Certifying Bill of Exceptions and
for Transmission of Original Exhibits.**

The above-named defendants, having prepared

and filed in the above-entitled court and cause their proposed bill of exceptions to be used on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and having served the same on the plaintiffs, and the time allowed for preparing, serving and filing amendments thereto having expired and plaintiffs having failed to serve or file any amendments or objections to said proposed bill of exceptions, and it appearing to the Court that said bill of exceptions is in proper form and contains a full, true and correct copy of all the proceedings of the said trial and of the testimony and evidence and all of the same upon which said cause was tried and final decree entered therein, and the Court being fully advised in the premises,—[321]

IT IS ORDERED: That the foregoing bill of exceptions, consisting of the transcript of the record of evidence and proceedings had at said trial certified by the official court stenographer, decision and opinion of the trial court, findings of fact and conclusions of law, defendants' exceptions to findings of fact and conclusions of law, order allowing exceptions, order enlarging time for filing and serving bill of exceptions to August 20, 1920, plaintiff's original exhibit "A," defendants' original exhibits 1, 2, 3, 4 and 5, and this order settling and certifying the defendants' bill of exceptions, be, and the same is allowed, approved, settled and made a part of the record of this cause and that said bill of exceptions be filed as a part of the record of this cause in the office of the clerk of this court, and that said bill of exceptions, consisting of the record,

files, papers, proceedings, transcript of testimony and the original exhibits aforesaid, constitute defendants' bill of exceptions on appeal of said cause to the United States Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED, that the clerk of this court transmit by registered United States mail, postpaid, to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, State of California, the six (6) original exhibits hereinbefore referred to, introduced upon the trial of said cause and marked Plaintiffs' Exhibit "A," Defendants' Exhibit 1, Defendants' Exhibit 2, Defendants' Exhibit 3, Defendants' Exhibit 4 and Defendants' Exhibit 5, respectively, for the use and inspection of said Appellate Court, and that the same be in same manner returned to the clerk of this court whenever said cause shall [322] have been finally determined in said Appellate Court.

IT IS HEREBY CERTIFIED, by the undersigned Judge, before whom said trial of said cause was had, that said bill of exceptions is and constitutes a full, true and correct copy of all the proceedings of the said trial and of the testimony and evidence, and all of the same, upon which said cause was tried and final decree entered therein, and, also, a full, true and correct copy of the decision and opinion of the trial court, of all findings of fact and conclusions of law made and entered in said cause, of all of defendants' exceptions thereto, of the order allowing such exceptions, and of the order

enlarging the same for filing and serving bill of exceptions to August 20, 1920.

Done, certified and signed in chambers, being the District Court for the Territory of Alaska, Third Division, on this 19th day of October, A. D. 1920, by the Judge of said court before whom trial of said cause was had.

CHARLES E. BUNNELL,
Judge. [323]

Filed in the District Court, Territory of Alaska, Third Division. Nov. 17, 1920. Arthur Lang, Clerk. By Aaron E. Rucker, Deputy.

In the District Court for the Territory of Alaska,
Third Division.

No. C-173—IN EQUITY.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Corporation,
Defendants.

Praeceptum for Transcript of Record.

Please make, certify and transmit forthwith to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, a copy of the record in the above-entitled cause as a return to the appeal heretofore taken and allowed the defendants to review the decree in said cause, which

record shall consist of the following files and records, to wit:

1. Amended complaint.
2. Answer to amended complaint.
3. Reply.
4. Decree entered May 26th, 1920.
5. Petition for appeal.
6. Assignment of errors.
7. Order approving bond and allowing appeal.
8. Original citation.
9. Proof of service of citation.
10. Original bond for costs on appeal.
11. Bill of exceptions with exhibits mentioned in the order settling and certifying same.
12. This praecipe. [324]

Dated this 16th day of November, 1920.

EDWARD F. MEDLEY,
B. O. GRAHAM,
Attorneys for Defendants. [325]

In the District Court for the Territory of Alaska,
Third Division.

No. C-173.

A. E. LATHROP and ALICE JOHNSON,
Plaintiffs,

vs.

H. A. SLATER and BANK OF ALASKA, a Corporation,
Defendants.

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,
Territory of Alaska,
Third Division,—ss.

I, Arthur Lang, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the hereto annexed 325 pages, numbered from 1 to 325, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above-entitled cause, as the same appears on the records and files in my office; that the same is made in accordance with the praecipe filed herein by B. O. Graham and Edward F. Medley, attorneys for the defendants and plaintiffs in error.

I further certify that the foregoing transcript has been prepared, examined and certified to by me and the cost thereof, amounting to \$23.55, was paid to me by Mr. B. O. Graham, one of the attorneys for defendants and plaintiffs in error.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this court at Valdez, Alaska, this 16th day of December, A. D. 1920.

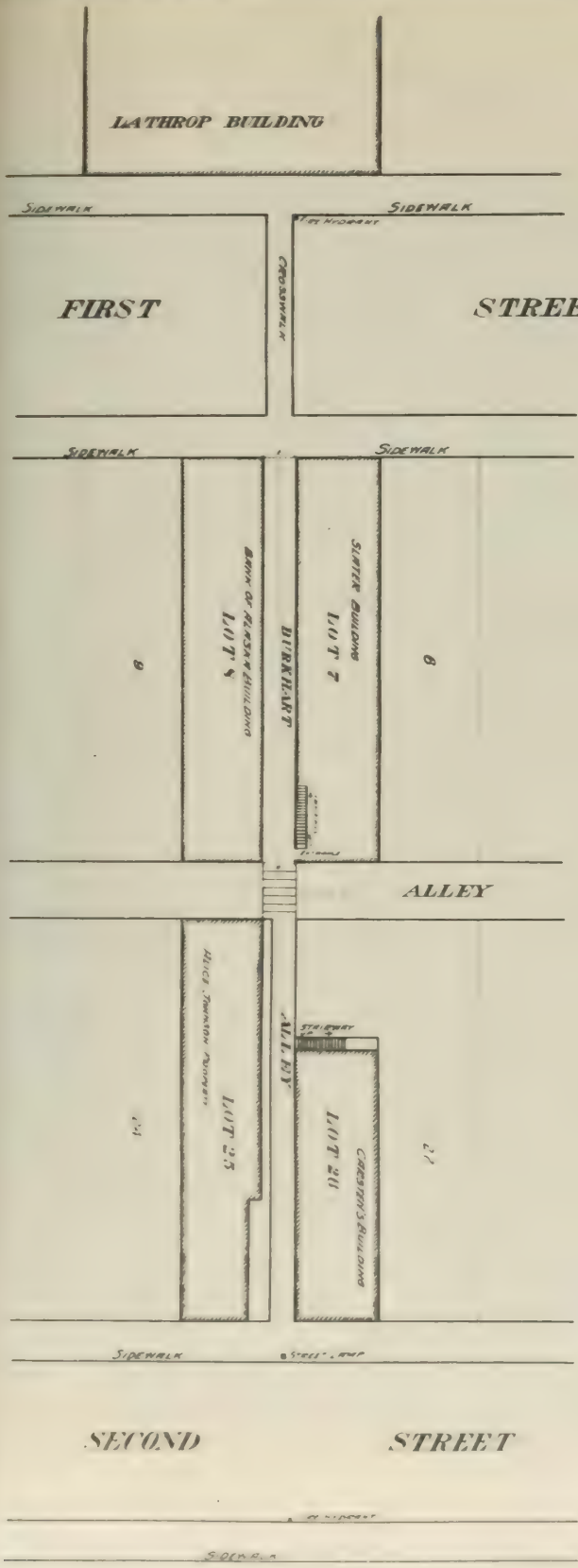
[Seal]

ARTHUR LANG,

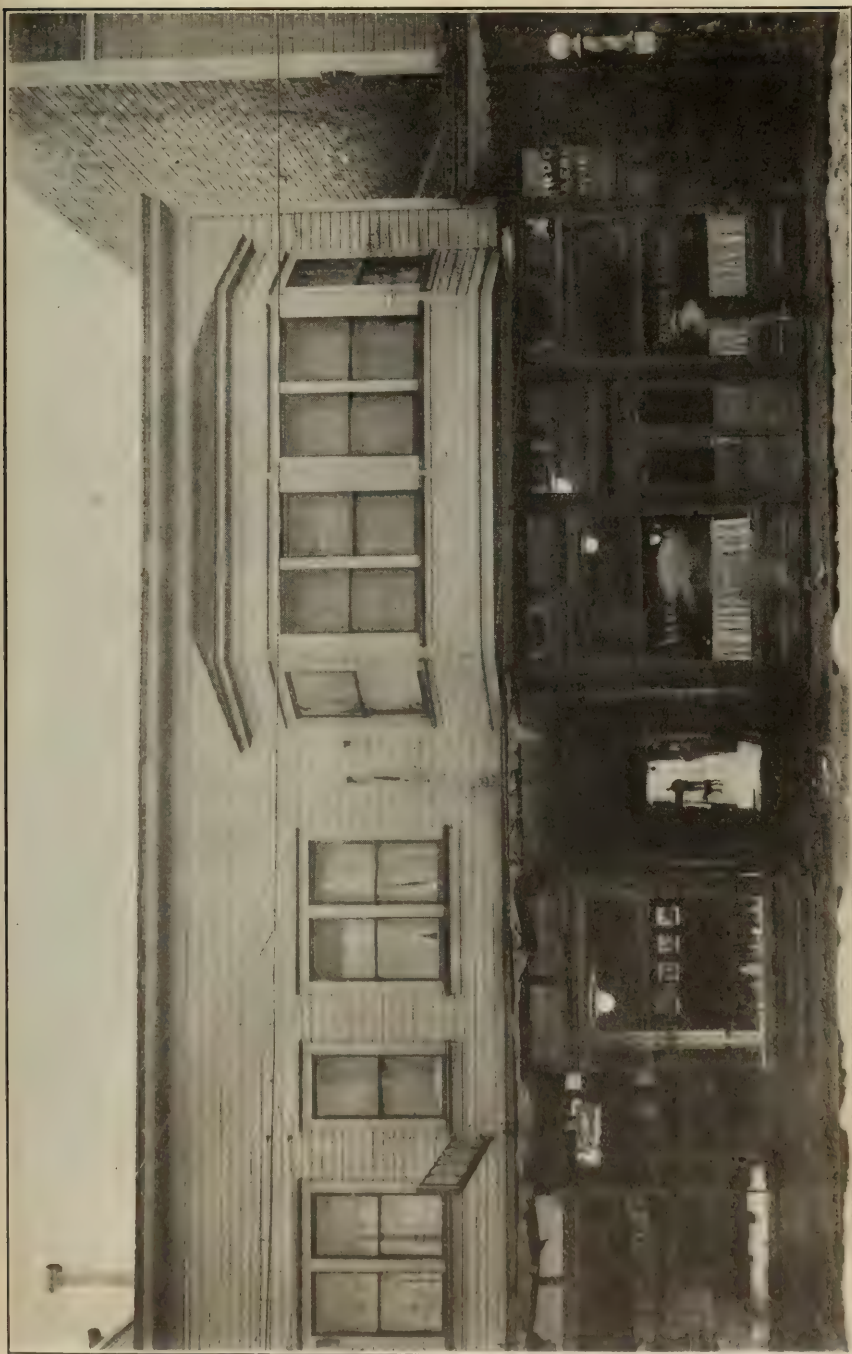
Clerk of the District Court for the Territory of
Alaska, Third Division. [326]

Scale 20 feet to an inch.

BLOCK 7

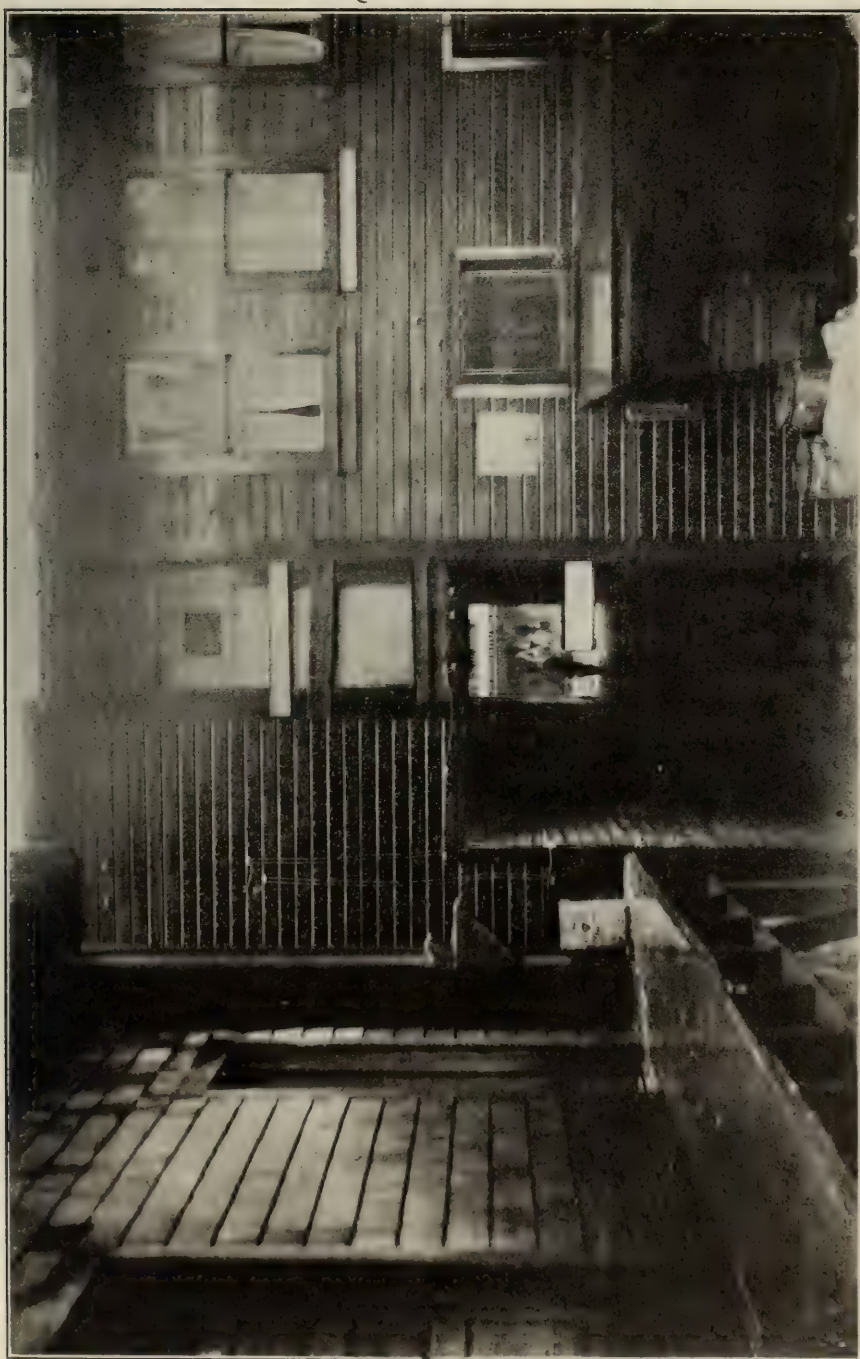


Defendants' Exhibit No. 1.



[Endorsed]: Defts. Identification #1. Defendant's Exhibit #1—Cause No. C-173. Filed in the District Court, Territory of Alaska, Third Division. Dec. 12, 1919. Arthur Lang, Clerk. By John B. Miller, Deputy.

Defendants' Exhibit No. 2.



[Endorsed]: Defts. Identification #2-C-173.
Defendants' Exhibit #2—Cause No. C-173. Filed
in the District Court, Territory of Alaska, Third
Division. Dec. 12, 1919. Arthur Lang, Clerk.
By John B. Miller, Deputy.

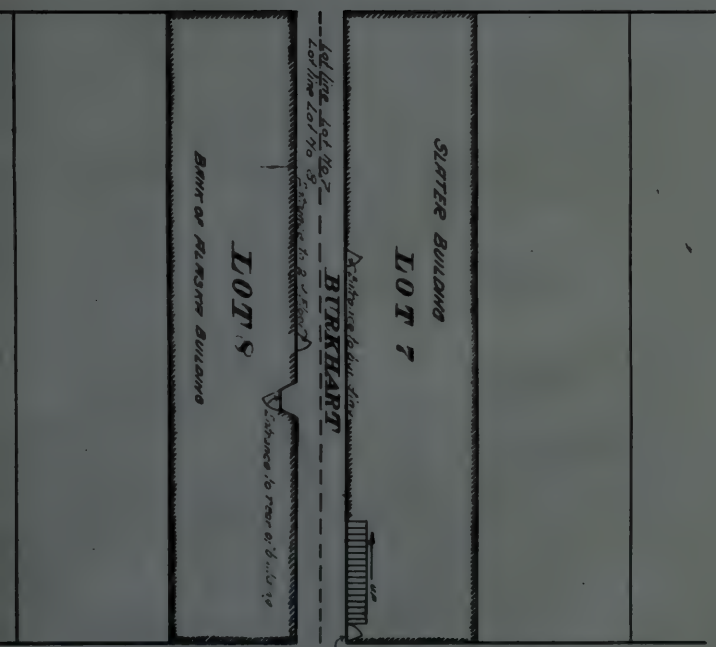
FIRST

STREET

Scale 20 feet to an inch

BLOCK

7



ALLEY

ALLEY



I, R. H. L. Noaks, United States Commissioner in and for the Territory of Alaska, Third Division, Cordova Precinct, and ex-officio Recorder of the Cordova Recording District, Alaska, do hereby certify that I have carefully compared the annexed and foregoing document with the original record in Book _____, page _____ thereof, in the office of said Recorder at Cordova, Alaska, and that the same is a true and complete copy of said record.

Witness my hand and official seal this _____ day of _____, 19____.

CORDOVA RECORDING DISTRICT
ALASKA

Surveyed by A. J. Adams. U.S. Dep. Surveyor
Scale: 1 inch = 100 feet

DEDICATION

[illegible]

WITNESS My hand and seal this 20th day of May, 1908

Date, in the presence of _____

United States of America } ss
District of Alaska

There is to certify that on the 20th day of
Before us a notary public, in and for the District of Alaska duly and
personally came George C. Harber to me known to be the person in
the to us: of whom the George C. Harber is the son, and a descendant in
the same line, and voluntarily for the use and purpose of the same.

Witness my hand and official seal this day, and year of our independence

DESCRIPTION

[illegible]

681

Concord

1895. 11. 11. 1895.

1990

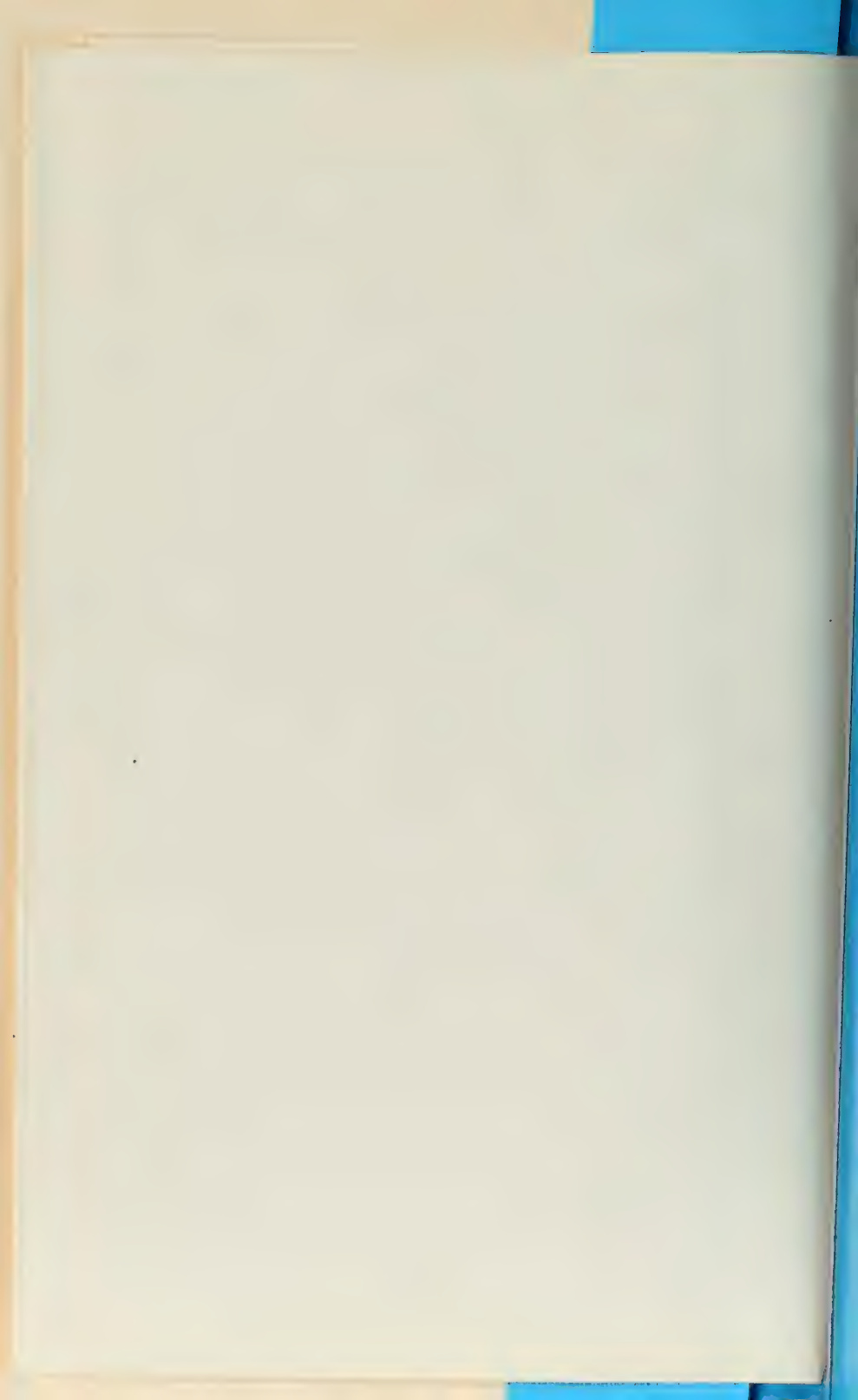
4210

44. case # 6473

ED in the District Court
City of Kansas, dated 11/1/90

DEC 19 1913

John A. ...



Scale 1 inch = 100 feet
SURVEYED BY A. JUDSON ADAMS
COMPILED IN 1910

THIS MAP IS AMENDATORY OF &
SUPPLEMENTAL TO THE ORIGINAL
PLAT OF THE TOWN OF CORDOVA
RECORDED IN THE OFFICE OF THE
RECORDER FOR THE CORDOVA PRE-
CINCT AT PAGE 10, BOOK 1 OF PLATS

[illegible]

Witness my hand and seal this 1st day of August 1881

With respect,
 { J. C. Swenson
 George C. Swenson

United States of America
District of Alaska
On this 17th day of August A.D. 1911, before me.

a notary public in and for the District of Alaska, personally or
personally also C. Muzalek, trustee, known to me to be the same per-
son named in and who executed the within instrument, and
acknowledged to me that he executed the same for the uses
and purposes therein named.

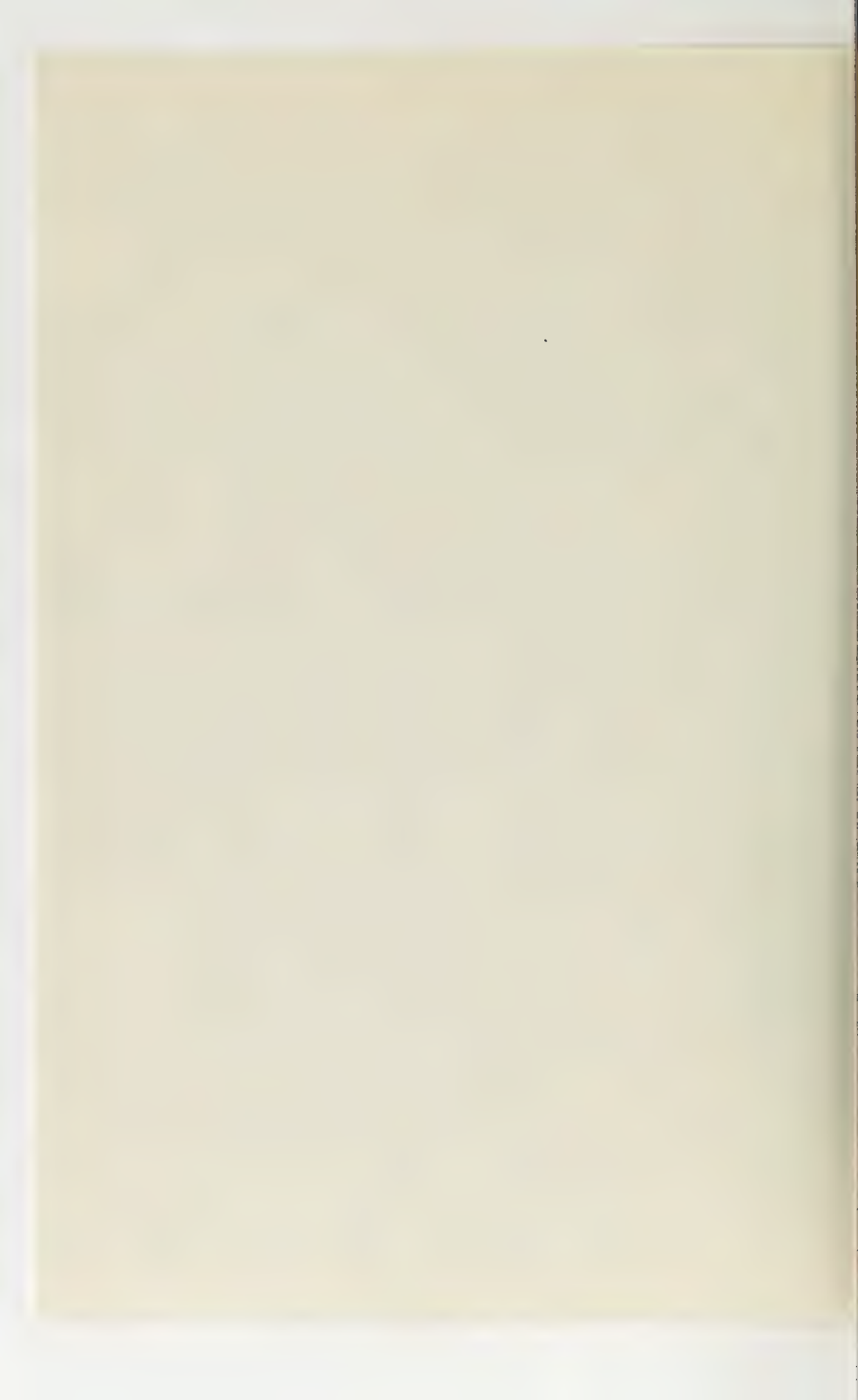
Witness my hand and official seal the day & I year in this
certificates above written

Robert Williams
Notary Public for Alaska

[illegible]

I, R. H. H. Neale, United States Commissioner in and for the Territory of Alaska, Third Division, Cordova Precinct, and ex officio Recorder of the Cordova Recording District, Alaska, do hereby certify that I have carefully compared the annexed and foregoing document with the original record in Book _____, page _____ thereof in the office of said Recorder at Cordova, Alaska, and that the same is a true and complete copy of said record.

W/trace my hand and official seal this _____ day of _____ 19____



[Endorsed]: No. 3626. United States Circuit Court of Appeals for the Ninth Circuit. H. A. Slater and Bank of Alaska, a Corporation, Appellants, vs. A. E. Lathrop and Alice Johnson, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Alaska, Third Division.

Filed January 5, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals for the
Ninth Circuit.

3626.

H. A. SLATER et al.,

Appellants,

vs.

A. E. LATHROP et al.,

Appellees.

**Order Extending Time to and Including January 10,
1921, to File Record and Docket Cause.**

Pursuant to telegram hereto annexed, and good cause therefor appearing, it is ORDERED that the time to file record and docket the above-entitled cause in this court be extended to and including January 10, 1921.

Dated: San Francisco, California, November 24,
1920.

W. H. HUNT,
United States Circuit Judge.

[TELEGRAM.]

2306

1920 Nov. 23 PM. 11 48

A577EA 50 NL Via Seattle

Cordova Alaska 23

Clerk Monckton,
Circuit Court of Appeals,
San Francisco, Calif.

Donohue and Dimond, Attorneys for Appellees
in *H. A. Slater et al.*, Appellants, versus *A. E.
Lathrop et al.*, Appellees, undocketed, have signed
stipulation for order enlarging time to file record
and docket case to January tenth, nineteen twenty-
one. Please request court to enter order accord-
ingly. Wire result. Collect.

B. O. GRAHAM.

[Endorsed]: No. 3626. United States Circuit
Court of Appeals for the Ninth Circuit. Order
Under Subdivision 1 of Rule 16 Enlarging Time to
and Including January 10, 1921, to File Record
and Docket Cause. Filed Nov. 24, 1920. F. D.
Monckton, Clerk. Refiled Jan. 5, 1921. F. D.
Monckton, Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

H. A. SLATER and BANK OF ALASKA, a Cor-
poration,

Appellants,

vs.

A. E. LATHROP and ALICE JOHNSON,

Appellees.

**Order Extending Time to and Including January 10,
1921, to File Record and Docket Cause.**

IT IS HEREBY STIPULATED AND
AGREED, that an order may be entered in the
United States Circuit Court of Appeals for the
Ninth Circuit, enlarging the time within which the
record on appeal from the District Court for the
Territory of Alaska, Third Division, may be filed
and the above-entitled cause may be docketed in
the United States Circuit Court of Appeals for the
Ninth Circuit until and including the 10th day of
January, 1921.

Dated at Cordova, Alaska, this 19th day of Novem-
ber, 1920.

EDWARD F. MEDLEY,

B. O. GRAHAM,

Attorneys for Appellants.

DONOHOE & DIAMOND,

By T. J. DONOHOE,

Attorneys for Appellees.

[Endorsed]: No. 3626. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including January 10, 1921, to File Record and Docket Cause. Refiled Jan. 5, 1921. F. D. Monckton, Clerk. Filed Dec. 3, 1920. F. D. Monckton, Clerk.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

H. A. SLATER and BANK OF
ALASKA, a Corporation,
Appellants,

vs.

A. E. LATHROP and ALICE
JOHNSON, *Appellees.*

No. 3626

Brief for Appellants

B. O. GRAHAM, Cordova;
EDWARD F. MEDLEY, Cordova;
E. E. RITCHIE, Valdez,
Attorneys for Appellants.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

H. A. SLATER and BANK OF
ALASKA, a Corporation,
Appellants,

vs.

A. E. LATHROP and ALICE
JOHNSON,
Appellees.

No. 3626

Upon Appeal from the District Court of the Terri-
tory of Alaska, Third Division.

Brief for Appellants

STATEMENT OF THE CASE

This appeal was taken by defendants in the trial court from a judgment enjoining them from closing an alley or passageway in the town of Cordova, Alaska, which was claimed by appellees, plaintiffs below, to be a public alley by implied dedication

and also by prescription. For convenience the parties will be designated as in the trial court.

The townsite of Cordova is located upon a steep and broken hillside. First and Second Streets run north and south across the general slope of the hill, Second Street being higher up the slope. Block 7 lies between the two and is bounded on the north by C Street and on the south by B Street, each running up hill from west to east. The distance from First and Second Streets is 214 feet, comprising lots 100 feet long and an alley 14 feet wide in the middle of the block parallel to First and Second Streets. Near the middle of the block, fronting on First Street, the main business street of the town, is lot 7, owned by defendant Slater, and adjoining it on the south is lot 8, owned by defendant Bank of Alaska. Lot 25 is across the alley directly east from lot 8, faces on Second Street, and is owned by plaintiff Alice Johnson. Block 26 lies beside lot 25 on its northerly side.

Burkhart Alley was left open in 1908 by the owners of lots 7, 8, 25 and 26. It is eight feet wide excepting a narrow platform to be described later. Four feet was taken off each of the four lots, and it runs through the middle of the four-lot area, from Second Street down hill to First. The alley

for 100 feet along lots 7 and 8 from First Street to the platted alley running east and west is level and covered by a substantial flooring; the second story of the adjacent buildings are built to the lot line at a height of twelve feet, fully covering this part of Burkhart Alley. From the rear of these buildings, which cover the whole of lots 7 and 8 to the cross alley, Burkhart Alley rises on a steep grade to Second Street. The extent or degree of this rise is not given in the record but the evidence shows that the basement of the "Burkhart Apartments," a building which covers the middle and rear of lot 25 (the Alice Johnson lot) is entered directly from Burkhart Alley, while the next story above is entered from a walk along its side running level from Second Street. This walk is about two feet wide and occupies that much of Burkhart Alley, the "Apartments" being set back four feet from the lot line, the same as the other three buildings adjoining the alley. Burkhart Alley, therefore, is six feet wide between lots 25 and 26.

Other facts which are undisputed are the following: That the city placed water hydrants opposite the ends of Burkhart Alley on each street. It maintained a light near the Second Street entrance and since 1915 maintained a light at the

entrance of the arcade or covered part of the alley. Lights were also maintained by adjacent owners or their tenants most of the time. The city council and chief of police several times required the adjacent owners to make repairs in the alley. An awning was maintained over the First Street entrance, and adjoining occupants of buildings used portions of the alley for private purposes. Owners of the four lots have been assessed for and have paid taxes on entire lots ever since the town was incorporated in 1909. It is admitted that travel through the alley has always been extensive, though the extent of the travel as compared with B and C Streets was variously estimated by witnesses. It is conceded that travel through the alley has been much less since the postoffice was moved from Second Street about 60 feet south of C Street, down to First Street.

ASSIGNMENT OF ERRORS

1

That the District Court for the Territory of Alaska, Third Division, erred in overruling defendants' objection to the following question propounded to Alice Johnson, one of the plaintiffs, called and sworn in her own behalf, and in permitting said witness to answer said question:

“Was the fact that Burkhart Alley was laid out and being used generally by the public one of the inducements that induced you to buy that property for \$5,000.00?”

Said court erred in sustaining plaintiffs' objection to the following question propounded by defendant's counsel to witness Bartley Howard and in refusing to permit said witness to answer said question:

“I wish you would explain what was done and said by the members of the council—what was said by the members of the council at that time in regard to raising the assessor's assessment on lots 7 and 8, block 7, from \$6,000.00 to \$7,500.00?”

Said court erred in sustaining plaintiffs' objection to defendants' offer in evidence of certified extract from the minutes of the common council of the town of Cordova, relating to motion made by the plaintiff Lathrop, a member of the council:

“That the city clerk be instructed to intervene in behalf of the city in this case”
and in rejecting said offer. (Transcript of Testimony, p. 208.)

Said court erred in permitting the witness A. E. Lathrop to answer the following question and in

denying defendants' motion to strike out the witness' answer to said question:

Q. "And what condition does that leave the surface of the alley in the winter time in regard to snow?"

A. "It is impossible to get through."

Said court erred in finding as a fact that part of Finding No. 1, which reads as follows:

"that each of said plaintiffs are particularly damaged in a manner special and different from the damage to the general public of the town of Cordova, by the acts committed by the above named defendants and in the acts threatened to be committed by the above named defendants as hereinafter set forth."

Said court erred in finding as a fact that part of Finding No. 1, which reads as follows:

"That plaintiffs bring this action * * * * *
for and on behalf of the general public of the said town of Cordova."

Said court erred in finding as a fact that part of Finding No. 3, which reads as follows:

"That if said defendants are permitted to obstruct said Burkhart Alley and to close the same

to the travel of the general public and to this plaintiff, this plaintiff will be especially damaged thereby, by causing a reduction in the rental values of said buildings and this plaintiff's income therefrom and will greatly depreciate the value of this plaintiff's said buildings and he will suffer irrevocable injury and loss."

Said court erred in finding as a fact that part of Finding No. 4, which reads as follows:

"That only entrance to her said apartments in the basement story is off Burkhart Alley and the second story by walk from Second Street."

Said court erred in finding as a fact that part of Finding No. 4, which reads as follows:

"at which time and for a great many years prior thereto, Burkhart Alley was and had been an open public way."

Said court erred in finding as a fact that part of Finding No. 4, which reads as follows:

"and was and had been continually used by the public as such."

Said court erred in finding as a fact that part of Finding No. 4, which reads as follows:

"That if said defendants are permitted to obstruct the said Burkhart Alley and to close the same to travel by the general public and to the use of this plaintiff, this plaintiff will suffer irreparable injury and loss in her property rights in said lot and building."

12

Said court erred in finding as a fact that part of Finding No. 4, which reads as follows:

"and the rental value of her apartments will be greatly depreciated and the value of her said lot and building will be greatly depreciated."

13

Said court erred in finding as a fact that part of Finding No. 6, which reads as follows:

"and they agreed among themselves to open an alley 8 feet wide from First Street to Second Street in said town."

14

Said court erred in finding as a fact that part of Finding No. 6, which reads as follows:

"That the owners of lot No. 7 and lot No. 26 in Block 7, gave 4 feet off the southerly side of their said lots for said alley."

15

Said court erred in finding as a fact that part of Finding No. 6, which reads as follows:

"the owners of lots Nos. 8 and 25, in block No. 7 gave 4 feet of the northerly side of their said lots for said alley."

16

Said court erred in finding as a fact that part of Finding No. 7, which reads as follows:

"That Burkhart Alley as herein described was originally opened up and ever since has been used and maintained.

17

Said court erred in finding as a fact that part of Finding No. 7, which reads as follows:

"That said Burkhart Alley was first opened up to public travel about the month of October, 1908."

18

Said court erred in finding as a fact that part of Finding No. 7, which reads as follows:

"and it ever since has been used by the general public as a public highway."

19

Said court erred in finding as a fact that part of Finding No. 7, which reads as follows:

"and ever since has continuously and without interruption, hindrance or permission of anyone been used as a public street, alley or highway by the general public and by these plaintiffs."

Said court erred in finding as a fact that part of Finding No. 7, which reads as follows:

“and ever since has * * without * * * permission of anyone been used as a public street, alley or highway by the general public and by these plaintiffs.”

Said court erred in finding as a fact that part of Finding No. 8, which reads as follows:

“the common council of the town of Cordova has exercised rights of ownership, authority and control over Burkhart Alley without hindrance, objection or permission from anyone whomsoever.”

Said court erred in finding as a fact that part of Finding No. 8, which reads as follows:

“that the said common council has provided for the lighting of said Burkhart Alley a good portion of said time.”

Said court erred in finding as a fact that part of Finding No. 8, which reads as follows:

“and has supervised and required the sidewalk in said alley to be kept in good repair.”

Said court erred in finding as a fact that part of Finding No. 8, which reads as follows:

“and by numerous and other acts has exercised dominion and control over said Burkhart Alley from the time of organization of said municipality until the present time.”

Said court erred in finding as a fact that part of Finding No. 9, which reads as follows:

“That at no time since Burkhart Alley was opened to the public use as hereinbefore described, have the owners of any of the four lots abutting on said alley claimed or contended that said alley was not a public highway until defendant Slater herein on the 8th day of August, 1919, and the defendant Bank of Alaska, on the 10th day of September, 1919, attempted to obstruct and close said Burkhart Alley and prevent the public and these plaintiffs from the free use and enjoyment thereof.”

Said court erred in finding as a fact that part of Finding No. 10, which reads as follows:

“that at the time each of said defendants purchased their respective lots, said Burkhart Alley was a public highway.”

Said court erred in finding as a fact that part of Finding No. 10, which reads as follows:

“and had been continuously used by the general public since the year 1908 as a public highway.”

Said court erred in finding as a fact that part of Finding No. 10, which reads as follows:

“and each of said defendants had full knowledge of said fact.”

Said court erred in finding as a fact that part of Finding No. 11, which reads as follows:

“That on the 8th day of August, 1919, defendant H. A. Slater unlawfully and without right or authority obstructed the free use and enjoyment of Burkhart Alley.”

Said court erred in finding as a fact that part of Finding No. 11, which reads as follows:

“that each of said defendants unlawfully claimed the right to close and obstruct Burkhart Alley.”

Said court erred in finding as a fact that part of Finding No. 12, which reads as follows:

“That if said defendants or either of them is permitted to obstruct and close said Burkhart Alley and prevent these plaintiffs and the general public

from the free use and enjoyment of said Burkhart Alley, these plaintiffs will suffer great and irreparable injury and loss in their property rights."

32

Said court erred in finding as a fact that part of Finding No. 12, which reads as follows:

"and the traveling public of the town of Cordova will suffer great inconvenience, loss and damage."

33

Said court erred in finding as a fact that part of Finding No. 13, which reads as follows:

"That more than ten (10) years have elapsed since said Burkhart Alley was laid out and first used as a public street, prior to the time either of these defendants first asserted or claimed the right to close said alley or any portion thereof."

34

Said court erred in finding as a fact that part of Finding No. 13, which reads as follows:

"and during all of said time, said Burkhart Alley was continuously and without interruption used by and in the exclusive possession of the inhabitants, residents and general public of the said town of Cordova, as a public street or alley."

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Said court erred in finding as a fact that part of Finding No. 13, which reads as follows:

“with the knowledge and acquiescence at all times of the owners of all of said lots crossed by said alley and without license or permission of, hindrance or objection from, any person or persons whomsoever.”

Said court erred in finding as a fact that part of Finding No. 13, which reads as follows:

“and that such use, and possession by the public of said alley as a public alley was during all of said time, adverse, hostile, continuous, exclusive and under color and claim of right.”

Said court erred in finding as a fact that part of Finding No. 13, which reads as follows:

“that the common council of the town of Cordova, shortly after said Burkhart Alley was first opened to public travel and use as hereinbefore stated, accepted said alley as a public thoroughfare by lighting the same.”

Said court erred in finding as a fact that part of Finding No. 13, which reads as follows:

“that the common council of the town of Cordova,
* * * * accepted said alley as a public thoroughfare by * * * * keeping the same clear from all obstructions.”

Said court erred in finding as a fact that part of Finding No. 13, which reads as follows:

“that the common council of the town of Cordova
* * * * accepted said alley as a public thoroughfare by * * * * requiring the sidewalk in said alley to be kept in good repair.”

Said court erred in finding as a fact that part of Finding No. 13, which reads as follows:

“and generally exercised supervision, control and ownership over said alley and continued to do so up to the present time.”

Said court erred in finding as a fact that part of Finding No. 13, which reads as follows:

“that the travel and use of said alley by the general passing through said alley and over and upon the same, far exceeded the travel on either B or C Streets between First and Second Streets during all the time hereinbefore mentioned.”

Said court erred in concluding and adopting that part of Conclusion of Law No. 1, which reads as follows:

“That said Burkhart Alley in the month of October, 1908, became and ever since has been and

now is a public thoroughfare or alley by reason of an implied dedication arising from the acts of the owners of lots Nos. 7 and 8 and lots Nos. 25 and 26, in block No. 7, in the town of Cordova."

Said court erred in concluding and adopting Conclusion of Law No. 2, which reads as follows:

"That said Burkhart Alley as described in the foregoing findings of fact, at the time when said defendants attempted to obstruct a portion of said alley, to-wit, on the 8th day of August, 1919, and on the 10th day of September, 1919, was, and ever since has been, and now is, a public thoroughfare and alley by prescription, the same having been used exclusively and continuously by the general public of the town of Cordova for a period of more than ten years prior to the said 8th day of August, 1919, under color of title and claim of right, and adverse and hostile to the owners of the respective lots over which said alley passes and with the knowledge and acquiescence of said owners but without their license or permission, and without any objections from them or any of them."

Said court erred in concluding and adopting that part of Conclusion of Law No. 2, which reads as follows:

"That said Burkhart Alley as described in the foregoing Findings of Fact, was at the time when said defendants attempted to obstruct and close a portion of said alley, to-wit: On the 8th day of

August, 1919, and on the 10th day of September, 1919, was, and ever since has been, and now is, a public thoroughfare and alley by prescription."

Said court erred in concluding and adopting Conclusion of Law No. 3, which reads as follows:

"That plaintiffs are entitled to have said Burkhart Alley as described in the foregoing Findings of Fact, maintained and kept free from obstructions and continuously open for the free and uninterrupted travel and use by these plaintiffs and the general public of the town of Cordova, as a public thoroughfare or alley."

The court erred in concluding and adopting that part of Conclusion of Law No. 4, which reads as follows:

"That these plaintiffs are entitled to have said defendants and each of them enjoined from in any manner obstructing or closing said Burkhart Alley as described in the foregoing Findings of Fact where the same passes upon and over lots Nos. 7 and 8, in block No. 7, in said town of Cordova."

Said court erred in concluding and adopting Conclusion of Law No. 4, which reads as follows:

"That these plaintiffs are entitled to have said defendants and each of them enjoined from in any

manner obstructing or closing said Burkhardt Alley as described in the foregoing Finding of Fact where the same passes upon and over lots Nos. 7 and 8, in block No. 7, in said town of Cordova, to-wit: An alley eight (8) feet wide, the center of which is the dividing line between lots Nos. 7 and 8, in block No. 7, and twelve (12) feet high for the entire length of lots Nos. 7 and 8, and from in any manner whatever obstructing or closing said alley or any part or portion thereof or in any manner interfering with the free use and enjoyment thereof as a public highway as the same was when first laid out and opened to public use and travel and ever since has been used and traveled by the public."

Said court erred in concluding and adopting Conclusion of Law No. 5, or the order contained in paragraph No. 5 of said Conclusions of Law, if same is intended as an order, which Conclusion of Law reads as follows:

"That plaintiffs have decreed against defendants and each of them in accordance with their prayer of their amended complaint and in accordance with the foregoing conclusions of law and have judgment against said defendants and each of them for the costs and disbursements incurred in this action by plaintiffs."

Said court erred in entering its decree and judgment in favor of the plaintiffs and against the de-

fendants on the 26th day of May, 1920, for the reason that said decree and judgment is contrary to law and is not supported by the Findings of Fact or Conclusions of Law, pleadings or evidence in this cause.

ARGUMENT

It will be observed that the Findings of Fact are very long, and counsel for defendants believe it a fair commentary upon them to say that they contain many repetitions, much needless detail and iteration; much that is an abstract of testimony rather than statement of ultimate fact; much that is argumentative; and that they indicate an intent to negative every possible construction of the evidence that would militate against any averments in plaintiffs' complaint. This made it necessary for defendants to file a long list of exceptions to the findings. Some of these, doubtless, are unimportant, and it would be useless as well as tedious to discuss them in detail. All the findings and exceptions produce in substance only one issue, in the opinion of defendants' counsel. This brief will aim to arrange the assignments of error into such groups as will tend to short and logical argument, directing attention to repetitions in the findings.

The findings as to the interests of plaintiffs seem to defendants to be relatively unimportant. If Burkhart Alley is decided to be a public way the interests of plaintiffs will be fully protected. If it is a private way they have no interests which can prevail against the property rights of defendants.

The really important findings, then, are those which form the basis for the decree adjudging the alley to be a public way. Exceptions to these findings were taken and are set up in the Assignments of Error Nos. 9, 10, 13, 14 to 28 inclusive, 33 to 40 inclusive. These findings set up with much repetition, closely resembling argument and conclusions, facts found by the court. Defendants urge that these Findings of Fact are contrary to the great weight of the evidence, and that the Conclusions of Law drawn from them are wholly erroneous.

The assignments of error just noted are based on exceptions to findings that Burkhart Alley for many years had been "an open public way and had been continually used by the public as such"; that the owners of the lots "agreed among themselves to open an alley eight feet wide from First Street to Second Street in said town"; that they each gave four feet for said alley; "that Burkhart Alley

as herein described was originally opened up and ever since has been used and maintained"; "that said Burkhart Alley was first opened up to public travel about the month of October, 1908, and it ever since has been used by the general public as a public highway; and ever since has continuously and without interruption, hindrance or permission of anyone been used as a public street, alley or highway by the general public."

The assignments mentioned also assign error in Finding No. 8 "that said common council has provided for the lighting of said Burkhart Alley a good portion of said time; and has supervised and required the sidewalk in said alley to be kept in good repair by numerous and other acts has exercised dominion and control over said Burkhart Alley from the time of the organization of said municipality until the present time."

Finding No. 8 also contains the following expansive statement, assigned as error in Assignment 21; "the common council of the town of Cordova has exercised rights of ownership, authority and control over Burkhart Alley without hindrance, objection or permission from anyone whomsoever."

The assertion in the foregoing finding that the town of Cordova has exercised rights of "owner-

ship" over Burkhart Alley seems to call for further definition in view of the fact that plaintiffs do not claim the public right in the alley to be anything but an easement, and the decree expressly states that the public and the plaintiffs "have a perpetual easement over and upon said alley for public travel." It is probably fair to suggest that the declaration of municipal ownership is merely the climax of the earnest effort of plaintiffs' counsel to annihilate in the findings every atom of defense. Nevertheless, it is inconsistent with the record evidence offered by plaintiffs that the town council compelled "the owners" of the alley to repair.

If it be contended that the reference to "owners" in the order for repairs in the alley designates them as owners of the fee, it is difficult to see how that helps plaintiffs' case. Plaintiffs claim Burkhart Alley is an easement over the land. If the town owns the easement it owns Burkhart Alley and should make repairs itself. The orders of the town council that the lot owners should make repairs in the alley was a direct recognition that the alley was private property and the requirement that it should be kept in safe condition was a police measure, justified by the common public use.

Defendants tried to make an exhaustive statement of the facts at the beginning of this brief it appears to them that the issues are almost wholly of fact rather than law. Plaintiffs claim an implied dedication of the alley to public use, and further, a highway by prescription. While adjudications in similar cases are somewhat conflicting defendants suggest that the contradictions in the decisions are less real than apparent because of variations in facts. Appellants are persuaded that if this brief can aid in determination of the cause it can do so most effectively by clarifying the facts, which are strikingly unusual. Exhaustive citation of authorities by counsel for all the parties in the trial court failed to produce one case very closely resembling this one.

The record seems to show that court and counsel in the district court agreed generally that an implied dedication of a public highway must be based upon such a state of facts as point clearly and definitely to the unavoidable conclusion that a dedication was intended, or that the facts are such as raise an equitable estoppel against the claimant of the land, forbidding him to assert any rights after long acquiescence in unchallenged public use; and that highway by prescription must be by pub-

lic use adverse to the private right, exclusive, continuous, uninterrupted, under color of right, and in no way permissive, or suggestive of mere license.

When the new town of Cordova began building in 1908, as already set out in the statement of the case, the owners of the four lots bordering Burkhardt Alley erected their buildings four feet back from the lot line, leaving the eight-foot alley. The agreement among them is stated concisely by Robert Ashland in his deposition, and its material facts are not disputed by any witness. Ashland testified (R. 220) that he built on lot 7, M. Finklestein on lot 26, Henry Burkhardt on lots 8 and 23, and that there was an agreement among them for the alley, and stated further in answer to questions:

"Well, I can't remember who was present. I know Henry Burkhardt's brother was present. Then Finkelstein, Henry Burkhardt and myself had a conversation. They were all present at the same time. We agreed to build this hallway with the understanding that if at any time any of us wanted to close up the hallway we had a perfect right to do so" (R. 223).

Ashland testified further that it was never the intention to make the alley a public one, and that the lot owners constructed all the planking through-

out its length, including the crossing of the platted alley (R. 225-6). In answer to a cross-interrogatory as to general public travel through the alley, he said:

“Anybody could travel through there with our permission, of course, but it could be closed up at any time” (R. 228).

Ashland strenuously denied that any agreement was made that the consent of all the property owners would be necessary to close the alley (R. 228). M. Finkelstein, who built on lot 26, closely corroborated Ashland except that he said he could not remember any particular conversation, nor with any particular person, but the understanding among the lot owners was to create the alley for their own convenience (R. 289-90-91). When asked whether the agreement was for a public alley, he answered:

“Positively not; it was not for a public alley at all, but for our own convenience, to get to our buildings more easily” (R. 291).

Finklestein further testified that the lot owners all agreed that the alley might be closed at any time. Also, that the lot owners constructed the planking, and as long as he was interested made all repairs (R. 291-292).

David McDonald, a witness for plaintiff, was asked on direct examination:

Q. "What, if anything, was said by Ashland or Burkhart, or both of them, at the time you had these conversations, as to whether Burkhart Alley was a public thoroughfare and would remain open as a public thoroughfare?"

A. "There was nothing like that" (R. 191).

Defendant Slater and Bartley Howard each testified that he had been a member of the town council several years; that property owners were required to keep sidewalks in front of their lots repaired, and this was not contradicted. (No evidence of an ordinance on the subject was introduced.) Slater testified that he had paid for repairs on the First Avenue sidewalk in front of his part of Burkhart Alley (R. 238). David McDonald, who had been a part owner of lot 7 prior to Slater, testified that he had paid for such repairs (R. 198). Bartley Howard testified that he had repaired the sidewalk on First Avenue in front of Burkhart Alley and had been paid for it by the owners, Slater and Burkhart (R. 266).

On cross-examination by Mr. Donohoe, attorney for plaintiffs, Howard testified:

Q. "I will read an extract from page 437 of Book One of the Minutes of the Town Council of Cordova,

as follows: 'It was reported that Burkhart Alley was in bad condition and it was decided that the owners should be notified to have it repaired.' Do you remember of that action?"

A. "Yes, sir."

Q. "And do you know if the owners were instructed to repair in pursuance of that resolution?"

A. "If I am not mistaken I notified Mr. Burkhart myself at the request of the street committee—it was his sidewalk in front of the alleyway on Second Avenue that was sloping toward the street, very steep and dangerous, and I notified Mr. Burkhart the next morning to raise it up" (R. 276-7).

In this connection defendants urge the third assignment of error:

Said court erred in sustaining plaintiffs' objection to defendant's offer in evidence of certified abstract from the minutes of the common council of the town of Cordova, relating to a motion made by plaintiff Lathrop, a member of the council:

"That the city clerk be instructed to intervene in behalf of the city in this case."
and in rejecting said offer (R. 279-280).

Inasmuch as the gist of the action was the claim of plaintiffs that Burkhart alley is a public highway it appears to defendants that the attitude of the town council toward the controversy was evidence both competent and material. The court found as a fact that the town had at the time between 2,000 and 3,000 inhabitants (R. 336); as a further fact that the two plaintiffs brought the suit to protect their own private rights and for and on behalf of the general public. The only basis for this finding was the pleadings and testimony of the two plaintiffs. All the other inhabitants of Cordova, including six councilmen, perversely or stupidly slept upon their rights. It was left for the two plaintiffs to uphold the public interest with a zeal almost equal to that of the three tailors of Tuley Street, who spoke for the people of England.

In Finding 4 it is recited that the lot owners gave four feet each to form the alley, "leaving an alley eight feet wide from First Street to Second Street," and further along in the same finding it is set forth that "at the time said alley was opened the owners of lot 25 erected two high walks 20 inches wide which did not follow the grade of the alley but was on a level of the first floor of the building erected on said lot 25." These two high walks occupy a

part of the eight-foot space which the finding affirms was given to the public. The court's first conclusion of law states that "Burkhart Alley in October, 1908, became and ever since has been and now is a public thoroughfare by reason of an implied dedication arising from the acts of the owners" of the four lots.

If the lot owners gave four feet each to form the alley and a dedication resulted, the intrusion of the 20-inch walks upon the eight-foot space was a purpresture. It is true the finding proceeds to describe the subtraction from the alley of the space occupied by the high walks, but that is inconsistent with the "dedication" of the four feet "given" by the owner of that lot.

Defendants' counsel urge that these inconsistencies and contradictions in the findings and conclusions seriously impair the force of the ultimate conclusion embodied in the decree—that Burkhart Alley is a public thoroughfare. In connection with the physical facts they point strongly to the opposite conclusion—that the alley has always been a private one, such space being given up by each owner as suited his own purposes and convenience.

Assignment 23 is directed against the finding that the town council "has supervised and required

the sidewalk to be kept in good repair." Defendants will not burden this court with definitions of a sidewalk, but submit that a planking of even surface extending across a public highway is not a "sidewalk," but rather a paving. There is no evidence in the record that town ordinances of Cordova require adjacent property owners to maintain streets and alleys to the middle line. It would scarcely be contended that if the town were to plank the platted alley running transversely through block 7 the property owners would have to maintain it. Defendants again call attention to the fact that the council ordered the "owners" of Burkhart Alley to repair it (R. 101-104). They respectfully suggest that all the acts of the town council affecting the alley were but an ordinary exercise of the police power for public safety that might be exerted over private property, or were acts for public convenience by agreement with the property owners. No city would allow a pitfall to exist on a private way frequently used by the public.

As already suggested in this brief the case in some features is one of first impression. Counsel have been unable to find in the books a claim of public way presenting the same physical facts.

Possibly no nearer approximation can be found than in *City of Clatskanie v. McDonald*, 85 Or. 670, 167 P. 560. The defendant set the front of his hotel building back five feet from a road, afterwards Bridge Street in the city. Further facts are thus stated by the court:

“In front of the building he laid flooring five feet in width and roofed it over. The roof was supported by six wooden pillars, which stood out five feet from the front of the building. A door and two windows on the second floor of the hotel opened out on this roof, which was on the same level as the second floor of the hotel. In 1908 the pillars were removed, and thereafter the roof was supported by braces; at the same time defendant extended the flooring or sidewalk in front of the hotel to a width of eight feet. It is admitted that subsequent to 1906 most of the foot travel on the street has passed over this sidewalk. The defendants have continuously paid taxes on the property in dispute.”

The adjoining owner on the north placed the front of her building on the same line with McDonald's. The adjoining owner on the south made his building project two feet further into the road. Suit was instituted in October, 1915, by the city of Clatskanie to determine the adverse claim of defendant to a disputed strip, claiming title by prescription, parol dedication and estoppel. It was conceded that the record title to the strip was in

defendants. The trial court entered decree for the defendants, which was affirmed by the supreme court, laying down these principles:

Where the use of a sidewalk was permissive in its origin it could not become adverse without some unequivocal assertion of the rights of the public inconsistent with the title of the record owner.

Dedication by acts in pais will not be assumed without clear evidence manifesting an unmistakable intention to abandon to the public use.

Although the levy of taxes does not estop the public from claiming property as a highway, the continuous payment of taxes is evidence rebutting the presumption of a dedication.

The title to real property cannot be divested by estoppel without clear and satisfactory evidence.

The opinion of the court cites many cases from Oregon and other states in support of its decision. It quotes from *Parrott vs. Stewart*, 65 Or. 254, 260, 132, P. 525, extracts from the opinion of Mr. Justice Bean, which extracts with the context read as follows:

“To establish a highway by prescription there must be an actual adverse public use, general, uninterrupted, continued for the period of the statute

of limitations under a claim of right. It was held in *Smith v. Gardner*, 12 Or. 226, 6 P. 771, that mere user of a highway, however long continued and uninterrupted, by the public, is not sufficient to prove a right in the public; but such user must be accompanied by acts, such as working the road, keeping it up by the public, repairing it or removing obstructions, etc., showing the use to have been under a claim of right, and not merely by permission of the landowners."

It has already been shown in the instant case that the town council ordered "the owners" of Burkhart Alley to repair it at least twice. The only evidence as to the removal of obstructions is in the testimony of George Dooley, that

"As chief of the fire department and as chief of police I made it a point to always keep that passageway clear and notified the owners that I didn't want any obstructions in the alleyway in case of fire, as I wished to go through there with the apparatus" (R. 116).

On cross-examination Dooley admitted that he gave no official order; that the adjacent property owners acceded cheerfully to his request that the alley be kept clear; and that it was no doubt regarded by them as a measure of fire protection to them and the general public (R. 120).

A case very similar to the Clatskanie case is *Morlang v. Parkersburg* (West Virginia), 100 S. E. 394. The court held that

“Where the owner of property abutting upon a city street constructs the building upon his property three and a half feet back from the street line, and paves the same in the same manner as the sidewalk is paved, and permits the public using such sidewalk to also use such paved strip between the front of his building and the street line as a sidewalk, he will not be held to have thereby dedicated the same to the public by implication, unless it be further shown that the public authorities, with his knowledge, exercise acts of dominion thereon indicative of their belief that the same has been dedicated to the public.”

The opinion in the Morland case cites the Clatskanie case and others to the same effect. It is found in 7 A. L. R. 718, where it is followed by a lengthy annotation on page 727.

“The use must be adverse to the owner of the fee. The rule is correctly stated in 2 Greenleaf on Evidence. The learned author, after defining prescription and the period of possession which constituted it, and explaining the modern practice which has introduced a new kind of title, namely, the presumption of a grant, made and lost in modern times, which the jury advised or directed to find, upon evidence of enjoyment for sufficient length of time, says: ‘In the United States grants have been very freely presumed, upon proof of an adverse, exclusive and uninterrupted enjoyment for twenty years.’ And after stating the quality of presumption which arises, he continues: ‘In order, however, that the enjoyment of an easement in another’s land may be conclusive of the right, it must have been adverse, that is under a claim of title, with the knowledge and acquiescence of the

owner of the land, and uninterrupted; and the burden of proving this is on the party claiming the easement. If he leaves it doubtful whether the enjoyment was adverse, known to the owner, and uninterrupted, it is not conclusive in his favor. Secs. 538-9.' Under a different rule, licenses would grow into grants of the fee, and permissive occupations of land become conveyances of it. 'It would shock that sense of right.' Chief Justice Marshal said in *Kirk v. Smith ex dem Penn.*, 9 Wheat. 286, 'which must be equally felt by legislators and judges, if a possession which was permissive and entirely consistent with the title of another should silently bar that title.' " *District of Columbia v. Robinson*, 180 U. S. 91-100.

The same doctrine in substance is elaborated in 37 Cyc. 28 et seq. with many citations.

A fair statement of apparently settled law is found in 18 Corpus Juris, P. 105, under the subtitle, "Public User of Private Way."

"Where the proprietor of land constructs a road over it for his own convenience, the mere user thereof by the public, by sufferance of the proprietor, no matter how long continued, will not show a dedication of the way to the public use nor vest any right in the public to the way. In applying this rule it has been uniformly held that a way constructed merely to provide convenient access to the owner's place of business, as for instance of a railroad depot, a wharf, or a store, does not become a public way from user by the public in going to and from such place of business. So also in applying the general rule it has been held that where adjoining landowners agree to reserve an alley between their

premises for their own use, the fact that the same for years is open to the public use and that in several conveyances it is described as an alley will not make it a public easement." Citing many cases.

In the same paragraph the text writer uses language almost identical with that employed in the opinion in *Parrott v. Stewart*, supra, but without citing that case, which was earliest in date:

"To establish a dedication the user must be accompanied by acts which show it to have been claimed as a right and not by permission of the owner, such as working on it, keeping it in repair, and requiring the removal of obstructions."

It appears to defendants needless to cite law or authorities at great length, since, as already suggested in this brief, practically one question is presented to this court for decision: Do the facts shown in the evidence justify the finding and judgment of the district court that Burkhart Alley is a public way? All other issues are incidental. No substantial difference in views of the law of dedication, prescription or estoppel as applied to highways can exist among lawyers. But in citing authorities and precedents it is always important to remember the observation of Mr. Justice Moody in *Home Telephone Co. v. Los Angeles*, 211 U. S. 264-274:

"It is obvious that no case, unless it is identical in its facts, can serve as a controlling precedent for

another, for differences, slight in themselves, may, through their relation with other facts, turn the balance one way or the other."

Counsel for defendants contend that the vital error of the trial court lay in drawing wrong conclusions from a few facts and ignoring the force of other facts equally weighty. We are not unmindful of the rule that appellate courts are reluctant to disturb the findings of a trial court where there is fair support for them in the evidence, but that rule is applicable where there is a conflict in the testimony. In this case there is scarcely any conflict in the testimony—none at all as to the physical facts of the public history of the alley. No material deviation was made by any witness from the statement of facts at the beginning of this brief.

Defendants, therefore, reiterate that the findings of the court except so far as they set out admitted facts, are conclusions and arguments in support of the judgment. Some of the findings, it is respectfully urged, are contradicted by the testimony of plaintiffs. The following are examples:

In Finding No. 13 (Assignment 38) it is asserted that "the common council of Cordova accepted said alley as a public thoroughfare by keeping the same clear from all obstructions." The

record is bare of evidence that the council ever did anything about obstructions. The police and fire chief notified the owners that he wanted the alley kept clear for fire apparatus.

In Finding No. 13 ,Assignment 37) it is stated that soon after the alley was opened the council accepted it "as a public thoroughfare by lighting the same." The alley was opened in 1908. A city light was first placed in it in the fall of 1912 (R. 106). Private lights were maintained in it from the beginning and for many years after the city light was put in.

Other inaccuracies have previously been noted. A striking feature of the findings is their use of terms more applicable to legal conclusions than to findings of fact. This is particularly marked in Finding No. 13, which states that the alley was used continuously and without interruption by the general public, which is admitted to be true. It then recites that the alley has been "in exclusive possession" of the public; "with the knowledge and acquiescence" of the lot owners; that such "use and possession" was at all time "adverse, hostile. continuous, exclusive and under color and claim of right." These recitals seem to embrace about all the

terms plaintiffs' counsel could find in the books that would help sweep away defendants' claims.

Defendants believe the authorities already cited in this brief, when applied to the facts of this case, cover all the law involved; that they exhibit serious errors in the findings and fatal error in the conclusions and judgment of the court. To avoid prolonging this brief counsel will merely refer to the following additional authorities supporting those already quoted from, defining the elements that constitute holdings "adverse, hostile, exclusive, continuous, and under color and claim of right."

Public use must be exclusive:

Leonard v. Detroit, 66 N. W. 488 (Mich.).

City of Atlanta v. Georgia et al, 98 S. E. 83.

Cincinnati et al. v. Cleveland et al., 123 N. E. 1 (Ind.).

Lewis v. City of Lincoln, 75 N. W. 154 (Neb.).

User by license or permission is not adverse:

Savannah v. Standard, etc., 78 S. E. 906 (Ga.).

Mitchell v. City of Denver, 78 P. 686.

B. & O. Ry. v. City of Seymour, 55 N. E. 953 (Ind.).

City of Spokane v. G. N. Ry., 158 P. 244.

Fitts v. Pierce County, 138 P. 885 (Wash.).

Presumption is that private way continues to be such:

City of Princeton v. Gustavson, 89 N. E. 653 (Ill.).

Town of Anchor v. Stewart, 110 N. E. 385 (Ill.).

Belleview Cemetery v. McEvers, 53 So. 272 (Ala.).

Sheridan County v. Patrick, 107 P. 748 (Wyo.).

Currie v. Bangor R. Co., 75 A. 51 (Me.).

Gascho v. Lennert, 97 N. E. 6 (Ind.).

Bradford v. Fultz, 149 N. W. 925 (Ia.).

Easter v. Overlea Land Co., 99 A. 893 (Md.).

Irving v. Ford, 32 N. W. 601 (Mich.).

The following federal cases touch many of the points in issue:

Coburn v. San Mateo County, 75 F. 520.

Irwin v. Dixon, 9 How. 10-30.

U. S. v. Rindge, 208 F. 611-618.

McKey v. Hyde Park Village, 134 U. S. 84.

Discussion of the law of implied dedication of highways would trespass upon the time of the court, since the principles are hardly subject to dispute. The subject is ably considered in 18 C. J., and at page 58 the rule is fairly summarized in this statement:

“A dedication is implied when the acts and conduct of the owner manifest an intention to devote the property to public use, and are inconsistent with any other theory than that he intended a dedication.”

Defendants (appellants) respectfully submit that the court's Findings of Fact were so clearly against the preponderance of the evidence that the Conclusions of Law were wholly erroneous, and the judgment should be reversed.

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No. 3626

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

N. A. SLATER and BANK OF ALASKA,
Appellants.

VS.

A. E. LATHROP and ALICE JOHN-
SON,
Appellees.

BRIEF OF APPELLEES.

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Filed February ..., 1921.
FRANK I. MONCKTON, Clerk.

By Deputy Clerk .

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BRIEF OF APPELLEES.

For convenience, the parties will be designated herein as they were in the court below. All references, unless otherwise specified, refer to pages of the printed record.

STATEMENT.

This is an appeal from a decree granting an injunction restraining the defendants from obstructing Burkhart Alley in Block 7, Cordova, Alaska.

Block 7 is bounded on the west by First Street (the chief business street of the town); on the east by Second Street; on the south by B Street, and on the north by C Street. The block is bisected from north to south by an alley which was laid out when the

townsite was platted the same as the streets mentioned. Burkhart Alley, the subject of the litigation, cuts through Block 7 easterly and westerly from First Street to Second Street near the center of the block. Plaintiff Lathrop owns a large building on the west side of First Street just opposite Burkhart Alley, and there is a cross-walk extending over First Street from the end of Burkhart Alley to the Lathrop Building; a portion of the Lathrop Building is occupied by a moving picture theater. The other plaintiff, Alice Johnson, is in possession of a building and lot 22x100 feet located on the southwest corner of Burkhart Alley and Second Street. This property she is purchasing on the installment plan, and she has paid most of the purchase price. The building is subdivided into twelve apartments used for residential purposes.

Defendants are the owners of lots 7 and 8 in block 7. These lots face on First Street, and flank Burkhart Alley on either side for a distance of 100 feet. The alley is 8 feet wide and the second floors of the buildings adjoin so that they cover the passageway completely from its intersection with the regular alley to First Street. The balance of Burkhart Alley, from the regular alley to Second Street is open overhead, except for an elevated walk along the south side about two feet wide used by tenants of the plaintiff Alice Johnson.

The plaintiffs assert that Burkhart Alley is a public thoroughfare, and that they have the right to travel over it, as over any other street in Cordova, and further, that owing to the position of their respective holdings, they would suffer special damage not suf-

ferred by the general public if the alley were closed. The defendants contend that Burkhart Alley is a private way, left open by the abutting property owners when they built their buildings, with the understanding that it might be closed up at will. The alley in controversy was opened up in October, 1908, and the defendants attempted to close it in August and September, 1919, but were enjoined by the plaintiffs.

THE EVIDENCE.

There is little conflict in the evidence. The plaintiffs' witnesses testified that in 1908 the owners of the two lots on the south side, and the owners of the two lots on the north side of Burkhart Alley, comprising the entire frontage between First and Second Streets, agreed to leave eight feet of space between their respective buildings, four feet off of the side of each lot, for an alleyway. Finkelstein, a witness for defendants (Tr., p. 288), testified: "We all had an understanding that the buildings should be so erected as to leave an eight-foot alleyway, that there should be such an alleyway between the buildings for our use. I do not recall all the details of the conversations." It was his understanding that the alley was to remain open unless *all* the abutting property owners agreed to close it. (Tr., pp. 292-295-296.) It was for the convenience of all. Ashland and other witnesses for the defendants all testified there was such an agreement between the abutting lot owners, but Ashland (Tr., p. 223) claimed that there was an understanding that the alley might be closed by any owner. Witness Harwood (Tr., pp. 134-135) testified that Burkhart

(one of the original owners of abutting property) had stated when the witness was leasing property on the alley that, "he (Burkhart) and Bob Ashland (who owned the lot adjoining) had agreed to keep that open, and that they entered into an agreement to donate four feet all the way through on the alley." (See, also, Tr., p. 150.) Pursuant to the agreement the buildings on either side of Burkhart Alley from First Street to Second Street were, in 1908, set back four feet—that is, the first floors. The second floors of the buildings facing on First Street each extended four feet over the alley, thus covering it for a distance of one hundred feet. The balance of the alley through to Second Street was left open, except for an elevated walk some two feet wide leading west from Second Street, and attached to the building on the south side of the alley. This situation created in 1908 remained unchanged until 1919. (Tr., pp. 64-67.) All the witnesses testified that the alley was used by the general public, passing through from First to Second Street. Some of the witnesses testified that travel for a number of years was greater through Burkhart Alley than on B and C Streets, which extend from First to Second Streets on either side of block 7. (Tr., pp. 67, 109, 173, 190, 195, 255.) There is no evidence denying this use by the public. Prior to August or September, 1919, the defendants or their predecessors in title never made any objection to the public use of the alley. (Tr., pp. 74, 243.)

The public authorities exercised acts of control as follows:

Maintained lights in the alley. (Tr., pp. 102-

112-113-114-165-171-265-274-276.) Fire hydrants installed. (Tr., pp. 100, 103.) Repairs ordered. (Tr., pp. 121, 253, 276.) Used for fire apparatus. (Tr., pp. 115-116, 119.) Ordered kept clear for hose carts. (Tr., pp. 72, 118, 119.) Display windows along the side of the alley (Tr., pp. 117, 192) showed further use as a public way.

SPECIAL DAMAGE TO PLAINTIFFS.

Uncontradicted testimony showed that crosswalks on First Street in Cordova were maintained at the intersections of public streets (Tr., pp. 59, 60, 61, 62, 157); other crosswalks had been ordered removed. (Tr., pp. 158-159.) That the crosswalk at the western terminus of Burkhart Alley, extending across First Street to plaintiff Lathrop's building, was used by many persons, notably those patronizing the moving picture theater, located on his property. If Burkhart Alley were closed, and this walk removed, plaintiff Lathrop would be damaged. Lathrop testified that property of plaintiff, Alice Johnson, at Second Street and Burkhart Alley would be greatly damaged if the alley were closed. He testified (Tr., p. 64): "As the property stands now it is practically First Avenue property—it is accessible from First Avenue." "It is nearer to First Avenue, being able to use the alley." Q. "Being able to use Burkhart Alley?" A. "Yes sir." Plaintiff Alice Johnson testified that the value of her property would be reduced 25% to 50% if Burkhart Alley closed. (Tr., pp. 90, 91.) There was not evidence contradicting the testimony of these two witnesses.

On rebuttal both plaintiffs, Lathrop and Johnson, testified that in winter the "regular" alley running north and south through Block 7 was impassable for foot-passengers. (Tr., pp. 297-300, also 304, 311, 312.) All travel was through Burkhart Alley.

Miss Johnson also testified that she was influenced by and relied on the existence of Burkhart Alley as a public way when she contracted for the purchase of the property facing on Second Street and extending along the south side of the alley. (Tr., pp. 89, 90.) That it would be necessary to either use the "regular" alley extending from B to C Streets or go around Second Street to reach First Street if the alley were closed. (Tr., p. 91.)

STATUTES.

There are no provisions in the Alaska Codes or session laws governing dedication, or the laying out or acceptance of streets by municipal bodies.

The Alaska statute of limitations in actions involving the title or possession of real property is ten years, except in cases of adverse possession under color of title. In the latter class of cases the period is seven years.

ARGUMENT.

We contend that the evidence was sufficient to support the findings, as follows:

No. 7.—That Burkhart Alley was first opened up to public travel about October, 1908 (Tr. pp. 337-8), and it ever since has been used by the general public as a public highway and ever since has continuously

and without interruption, hindrance or permission of anyone been used as a public street, alley or highway by the general public and these plaintiffs. (Tr. pp. 337-8.)

No. 8.—That the Common Council of Cordova exercised rights of ownership, authority and control over Burkhart Alley without hindrance or objection or permission from anyone, by providing for lighting and by numerous other acts from the time when the town of Cordova was organized. (Tr. p. 338.)

No. 9.—That prior to August, 1919, none of the owners of the four lots abutting in Burkhart Alley ever claimed or contended that said alley was not a public highway. (Tr. p. 339.)

No. 6.—That the owners of the abutting lots agreed among themselves to open an alley 8 feet wide from First Street to Second Street in said town. (Tr. p. 336.)

No. 1.—That the plaintiffs are damaged in a manner special and different from the damage to the general public of the town of Cordova by acts and threatened acts of the defendants. (Tr. p. 333.)

Nos. 3 and 4.—That if defendants are permitted to obstruct Burkhart Alley the plaintiffs will be specially damaged thereby by causing a reduction in rental value of plaintiffs' buildings. (Tr. pp. 334-335.)

THERE WAS A DEDICATION.

The owners of the four lots abutting on the alley agreed to leave an open space between their buildings, and carried out the agreement. Neither the original owners nor those claiming under them will be allowed

to dispute the accomplishment of the dedication by oral testimony to the effect that the land was devoted to a public use, but with a mental or secret reservation that it might be withdrawn from such public use. Dedication arises from acts, and requires no written instrument to transfer title. When property has once been turned over to the public it cannot be recalled. True, an intention on the part of the owner to part with his property must exist, but this intention will be presumed from the acts of the owner. The trial court has found there was an agreement to open this alley, and the evidence is uncontradicted that the alley was opened up and used for more than ten years by the public without objection from any of the abutting owners or without their giving any sign or hint that they claimed ownership. The dedication was an accomplished fact long before the defendants attempted in August and September, 1919, to close the alley.

Kennedy vs. City of Portland, 179 Pac. 667;
Evans vs. City of Brookings, 170 N. W. 133;
Schwerdtle vs. Placer County, 108 Cal. 589;
Leverone vs. Weakley, 155 Cal. at p. 400;
Humphrey vs. Krutz, 137 Pac. 806;
Robison vs. Gebaur, 152 N. W. 329.

Riley vs. Buchanan, (Ky.) 76 S. W. 527—

Leading case on almost all of the questions involved in the case at bar. The opinion reads, in part, as follows:

“If, however, there is not an express dedication, but the owner suffers the public to use the pass-way, knowing it is claiming it as a matter or right,

the law presumes a dedication to the public, and presumes the dedicator's intention to be in accord with the public's uses. This does not depend upon whether there has in fact been a dedication to the public, but is founded upon the principles of *estoppel in pais*. If the real owner suffer the public generally to so use his land as a passway, under a notorious claim of right, for a great length of time, *whereby others may have been induced to buy property in that vicinity* relying upon the apparent right of the public to use this passway, and by which the purchase price of their lands may have been affected, it is unfair that the owner should be permitted to gainsay the truth of it. The law operates upon his conscience and makes effectual that which he has suffered for so long to appear to be so, by raising the conclusive presumption that he has actually done what he allowed the public to believe he had done—dedicated the passway to the use of the public." (Italics ours.)

This also is the law as laid down in *McQuillan on Municipal Corporations*.

4 *McQuillan Mun. Corp.*, pp. 3196-3239-3242-3245.

Kennedy vs. City of Portland, 179 Pac. 667:

"The writer is unable to discover any logical reason for maintaining in the discussion any distinction between the acquisition of a highway by implied dedication and by prescription where the use has continued beyond the time fixed by the statute of limitations."

Hartley vs. Vermillion, 141 Cal. 339:

"When, as in this case, the public, or such portion of the public as had occasion to use the road,

traveled over the same, with full knowledge of the landowners interested, without asking or receiving any permission, and without objection from anyone, for a period of time beyond that required by law to bar a right of action, a right in the public to the use of the road arises by prescription or implied dedication."

The rule as laid down in the California cases hereinbefore cited, to the effect that dedication is implied from long continued use, has been followed in *Sherwood vs. Ahart*, 35 Cal. App. 84,—the Court said:

"The manner in which it became a public highway was through dedication by the owner and acceptance by the public. Such dedication is implied from the long and continuous use of said road with full knowledge of the land owners interested, without asking or receiving any permission, and without objection from anyone for a period of time beyond that required to bar the right of action. Under the authorities it must be held that the long-continued use, and with the acquiescence of the owners, raised the implication of dedication for such public purpose."

Chicago vs. Chicago R. R., 38 N. E. 768:

"The rule doubtless is that the intent testified to, will not be permitted to prevail against unequivocal acts and conduct on the part of the owner inconsistent with such intent, and upon which the public has a right to rely."

See also:

Morgan vs. R. R. Co., 96 U. S. 716;
City of Los Angeles vs. McCollom, 156 Cal.
 at 152-153.

In Rex vs. Lloyd, 1 Campbell 262, Lord Ellenborough said:

“If the owner of the soil throws open a passage and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing through it by a positive prohibition, he shall be presumed to have dedicated to the public.”

There was an acceptance of the right of way dedicated.

Long continued use by the public is sufficient.

Riley vs. Buchanan, 76 S. W. 527;

Robison vs. Gebauer, 152 N. W. 329.

The various instances of control over the alley by public officials of Cordova, noted above in this brief in summary of evidence, also show the acceptance.

THE PUBLIC AND THE PLAINTIFFS IN THIS SUIT ACQUIRED BY PRESCRIPTION THE RIGHT TO PASS OVER AND THROUGH BURKHART ALLEY AS AGAINST THE DEFENDANTS.

The evidence clearly shows that the general public and these defendants commenced to use the alley in 1908 and that this use continued without interruption and without permission of anyone for more than ten years. This applies to tenants who have occupied the building now in the possession of plaintiff Alice Johnson. A right to use a street or way may be gained by prescription.

Humphrey vs. Krutz, 137 Pac. 807;
Dallenbach vs. Burnham, 94 N. E. 41.

In *Lockey vs. City of Bozeman*, 113 Pac. 286, the following language appears:

"The facts bring this case clearly within the rule recognized generally—that a public highway may be established by prescription, without color of title, by proof of travel over it by the public, as a public highway, for the statutory period."

In *City of Seattle vs. Smithers*, 79 Pac. 615, the following:

"A road or street that has been used by the general public adversely for the period of limitation for quieting title to land becomes a public highway by prescription." Syllabus.

THERE MAY BE A QUALIFIED DEDICATION.

For instance, the right in the public to pass over a field and a right in the owner of the fee to plow the land where the right of way is exercised.

Mercer vs. Woodgate, L. R. 5 Q. B. 26 (1869).

In *Atkins vs. Boardman*, 2 Metcalf, 457 (Mass.) it was held that the owner of land over which a passageway had been reserved might lawfully cover such passageway with a building if he left a space so high, wide, and light, that the way continued substantially as convenient as before for the purposes for which it was reserved.

See, also,

Gerish vs. Shattuck, 132 Mass. 235, and
In re Roosevelt Ave., 174 N. Y. S. 600, at 603.

THE PLAINTIFFS HAD THE RIGHT TO BRING THIS SUIT.

They suffered special injury in the use of their property.

Sherwood vs. Ahart, 35 Cal. App. 84, at p. 86,
 bottom;
Leverone vs. Weakley, 155 Cal. 401;
Cushing vs. Wetmore Co., 152 Cal. 118.

Although plaintiff Alice Johnson had not completed the purchase of the property, she was nevertheless the owner of the equitable title, and was entitled to maintain this suit.

In re Roosevelt Ave., N. Y., 174 N. Y. S. 600,
 at 604.

FINDINGS AND CONCLUSIONS OF TRIAL COURT.

While the findings by the trial court are not binding upon this court on an appeal in equity, still weight should be given to them, and we urge that this is especially true in the present instance.

The trial judge (Tr., p. 200), in the course of the proceedings, made the following comment:

"I have been going through there more or less since 1909 and have had occasion to observe it very carefully the last few days—the sidewalks, openings, etc. However, I shall be glad to look at it again."

It is evident that the court below was in an exceptionally good position to pass on the facts in this case.

Defendant Slater evidently fully realized the weakness of his position because, prior to the time when he obstructed the alley (September, 1919), he appeared before the Council of Cordova and asked if objection would be raised by that body if he should close the alley. (Tr. pp. 234-235-236.) Slater stands in the same position as the plaintiff in *Schwerdtle vs. County of Placer*, 108 Cal. 596, where the Court say: "The placing of gates in 1887 was rather an acknowledgment than a denial of the public right, since permission to erect them was first asked of a member of the board of supervisors."

The decree should be affirmed.

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